

## ARTICLES

### CAMPAIGN COMMUNICATIONS AND THE PROBLEM OF GOVERNMENT MOTIVE

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#### ABSTRACT

*May courts consider campaign communications when screening for bad motives? More specifically, if a government official embraced constitutionally problematic reasons for acting when that official was campaigning for office, may courts rely on that fact when asking whether illicit or suspect purposes animate that official's post-election actions? The question recently arose during litigation concerning President Donald Trump's "travel ban," with different judges voicing different views on whether then-candidate Trump's expressions of religious animus should factor into an analysis of the travel ban's underlying purpose (and, by extension, its ultimate constitutionality). Some of those judges argued that the statements should carry no weight precisely because they were uttered during a campaign, thus suggesting that campaign communications should be categorically excluded from motive-related inquiries. This Article, by contrast, makes the case for an "inclusionary approach," which would treat campaign communications as potentially useful evidence to be considered alongside other indicators of illicit motive. This Article defends this approach as generally consistent with the role that motive analysis plays within constitutional law and as beneficial to the accurate judicial assessment of the government's reasons for acting. This Article also considers and acknowledges potential downsides to the approach, but it ultimately concludes that such downsides—though real—are not sufficiently serious as to warrant a categorical rule of exclusion.*

#### TABLE OF CONTENTS

INTRODUCTION .....	334
I. WHY MIGHT MOTIVES MATTER? .....	341
A. <i>Bad Motives Send Bad Messages</i> .....	342
B. <i>Bad Motives Yield Bad Outcomes</i> .....	346
C. <i>Bad Motives Reveal Bad Justifications</i> .....	349
D. <i>Bad Motives Are Bad Motives</i> .....	353
II. THE EVIDENTIARY VALUE OF CAMPAIGN COMMUNICATIONS .....	356
A. <i>Apparent Motives</i> .....	357
B. <i>Actual Motives</i> .....	359

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C. <i>Other Motives</i> .....	363
III. THE CONSEQUENCES OF INCLUSION.....	365
A. <i>Effects on Campaigning</i> .....	366
B. <i>Effects on Governing</i> .....	369
C. <i>Effects on Judging</i> .....	373
CONCLUSION .....	377

## INTRODUCTION

The path to power often runs through a political campaign. At the federal, state, and local levels, individuals wishing to acquire or retain office must frequently make their case to the voters, explaining why they deserve election to the position being sought. Candidates devote significant resources towards these efforts—speechifying, rallying, interviewing, advertising, tweeting, and doing any number of other things to have their message heard. And through these efforts, candidates create public records of positions, promises, narratives, arguments, and rationales concerning their plans for exercising the power they seek. Some elections are noisier than others—county coroner competitions tend not to generate as much buzz as the quadrennial race for the U.S. Presidency—but they all involve the same basic dynamic: candidates campaign by transmitting information to voters about what they intend to do and why they intend to do it.

Campaigns eventually conclude, but their records remain. And those records might subsequently be of interest to constitutional claimants challenging actions that victorious candidates go on to pursue. This is especially so when a challenge centers on the question of *government motive*—i.e., the reason why a government official or institution has chosen to pursue the action under review. Whether the relevant concern is discriminatory intent and the Equal Protection Clause,<sup>1</sup> sectarian purposes and the religion clauses,<sup>2</sup> protectionist objectives and the Dormant Commerce Clause,<sup>3</sup>

<sup>1</sup> See, e.g., *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”).

<sup>2</sup> See, e.g., *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005) (“When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality . . . .”); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (noting, in reference to the Free Exercise Clause, that “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest” (internal citation omitted) (citing *Emp’t Div. v. Smith*, 494 U.S. 872, 878–79 (1990)).

<sup>3</sup> See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (“A court may find that a state law constitutes ‘economic protectionism’ on proof either of discriminatory effect or of discriminatory purpose.” (internal citations omitted) (citing *Philadelphia v. New Jersey*, 437 U.S.

punitive aims and the Ex Post Facto Clause,<sup>4</sup> or other “suspect” motives under other constitutional provisions,<sup>5</sup> reviewing courts regularly consider not just the substance and effects of challenged government action, but also the motivating factors underlying its implementation.<sup>6</sup> And where the doctrine commands attention to the government’s reasons for acting, a past record of campaign communications might potentially shed light on what those reasons were.

Let us now pause to acknowledge the elephant in the room: Litigants recently pointed to numerous statements of then-candidate Donald Trump in arguing that various iterations of now-President Trump’s travel ban

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617, 624 (1978); *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 352–53 (1977)); *cf. Hunt*, 432 U.S. at 352–53 (highlighting the possibility of an “economic protection motive” in the course of striking down a law under the dormant Commerce Clause).

- 4 *See, e.g.,* *Flemming v. Nestor*, 363 U.S. 603, 613–14 (1960) (“In determining whether legislation which bases a disqualification on the happening of certain past event imposes a punishment, the Court has sought to discern the objects on which the enactment in question was focused.”); *see also* Alice Ristorph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1356–57 (2008) (highlighting a variety of ways in which “[s]tate intentions are relevant to the constitutional law of punishment”).
- 5 *See, e.g.,* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion) (“A finding of an undue burden is a shorthand for the conclusion that a state regulation has the *purpose* or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” (emphasis added)); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting that “[t]he government’s purpose is the controlling consideration” when it comes to evaluating a law’s content-neutrality under the Free Speech Clause); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (“[I]f 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.”). For more detailed descriptive overviews of the myriad doctrinal contexts in which motives analysis plays a part, *see, for example,* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 312–18 (1997); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1607 (2001); Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 537–53 (2016). *See also* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1793 (2008) (noting that “modern courts stand ready to enforce a broad variety of purpose-based restrictions on legislative power by examining the available legislative history and even by taking testimony about the legislature’s deliberations”).
- 6 The pattern, to be sure, is by no means uniform. Some of the Court’s decisions purport to disfavor reliance on government motive. *See, e.g.,* *United States v. O’Brien*, 391 U.S. 367, 383 (1968) (“It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”). *But see* Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (contending that “notwithstanding the Court’s protestations in *O’Brien* . . . First Amendment law . . . has as its primary, though unstated, object the discovery of improper governmental motives”). And some of its doctrinal frameworks prohibit such inquiries altogether. *See, e.g.,* *Whren v. United States*, 517 U.S. 806, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”). *But cf.* Cynthia Barmore, *Authoritarian Pretext and the Fourth Amendment*, 51 HARV. C.R.-C.L. L. REV. 273, 295–98 (2016) (highlighting areas of Fourth Amendment doctrine in which “the Court has recognized that the purpose behind enforcement is relevant to the Fourth Amendment question”).

reflected an intentional effort to discriminate on the basis of religion.<sup>7</sup> As a candidate, Trump frequently gave voice to anti-Muslim sentiments,<sup>8</sup> endorsing, among other things, a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”<sup>9</sup> Some lower court judges pointed to such statements in support of the conclusion that both prior and current versions of travel ban—though facially neutral with respect to religion—furthered the religiously discriminatory agenda that the Trump campaign openly embraced.<sup>10</sup> But other judges paid the statements no heed, insisting that any motive-based inquiry must exclude campaign-related evidence from its purview.<sup>11</sup> The travel-ban litigation thus presented one iteration of the question whether campaign communications ought to matter when it comes to gauging government motive: When asking whether the travel ban furthered a suspect or illicit government motive, should courts have been permitted to reach back into the record of Trump’s inflammatory campaign?<sup>12</sup>

7 The initial travel ban was promulgated just one week into the Trump presidency. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). But the President subsequently issued a revised travel-ban, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017), in response to an adverse judicial holding from the Ninth Circuit. *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017). Multiple lower courts then preliminarily enjoined that ban as well, but the Supreme Court partially lifted the injunctions, thus allowing the second travel ban to expire by its own terms. See *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017). A third, and this time permanent, travel ban was thereupon issued. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,161–62 (Sept. 24, 2017). That ban, too, was preliminarily enjoined in the lower courts, *State v. Trump*, 265 F. Supp. 3d 1140, 1160 (D. Haw. 2017), *aff’d in part*, No. 17–17168, 2017 WL 5343014 (9th Cir. Nov. 13, 2017), but the Supreme Court subsequently stayed the preliminary injunction and eventually reversed the lower court judgment. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

8 For a useful run-down of both pre-campaign and post-campaign remarks, see Jenna Johnson & Abigail Hauslohner, *I Think Islam Hates Us: A Timeline of Trump’s Comments About Islam and Muslims*, WASH. POST (May 20, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm\\_term=.e7b0a8ebadbb](https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.e7b0a8ebadbb).

9 See Russ Kick, *Trump’s Deleted “Preventing Muslim Immigration” Statement*, MEMORY HOLE 2 (May 10, 2017), <http://thefemoryhole2.org/blog/trump-muslim-immigration>.

10 See, e.g., *Washington v. Trump*, 847 F.3d at 1167; *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 594–96 (4th Cir. 2017), *vacated in part*, 137 S. Ct. 2080 (2017); *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 585–87 (D. Md. 2017), *vacated*, 138 S. Ct. 2710 (2018); *Aziz v. Trump*, 234 F. Supp. 3d 724, 737 (E.D. Va. 2017).

11 See, e.g., *Washington v. Trump*, 858 F.3d at 1173 (Kozinski, J., dissenting) (characterizing an inclusionary approach to campaign communications as “folly” and a “path [that] is strewn with danger”); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d at 649 (Niemeyer, J., dissenting) (characterizing the inclusionary approach as “fraught with danger and impracticability” and “completely strange to judicial analysis”).

12 As readers well know, the Supreme Court ultimately held that the plaintiffs could not show a likelihood of success on the merits with respect to their claim that the “travel ban” was unconstitutional, opting to disregard the voluminous record (both pre-and post-campaign) of the religiously discriminatory reasoning that Trump and other advocates embraced. *Trump v. Hawaii*, 138 S. Ct. at 2423. In so doing, however, the Court made no attempt to distinguish between campaign communications and subsequent communications uttered by Trump in his official

This Article develops a framework for thinking through both that specific question and the more general relationship between campaign communications and government motives across a range of different doctrinal contexts.<sup>13</sup> In particular, the Article endorses what I call an “inclusionary

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capacity. As the Court saw it, the travel-ban, as “a national security directive regulating the entry of aliens abroad,” was entitled to a highly (and perhaps even absolutely) deferential form of judicial review, under which *all* evidence of improper motive must yield to even the most tendentious set of post-hoc rationalizations. *Id.* at 2418; *see also id.* at 2420–21 (“[B]ecause there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.”). This was, in my view, an unpersuasive opinion with unsettling implications for future exercises of executive power. But what is more relevant for our purposes here is simply that the opinion did not ultimately address the question with which this Article grapples: the Court did not say one way or the other whether campaign-based communications carried any probative value with respect to motives-based constitutional review. Nor for that matter did the opinion render that question moot, given that there remain many other areas of doctrine in which the presence or absence of government motive still matters.

<sup>13</sup> Most of the existing commentary on this issue stemmed from the travel ban litigation, which spawned a number of blog posts concerning the constitutional relevance of then-candidate Trump’s statements about his proposed “Muslim ban.” *See, e.g.,* Vikram David Amar & Alan E. Brownstein, *The Complexities of a “Motive” Analysis in Challenging President Trump’s Executive Order Regarding Entry to the United States*, VERDICT: JUSTIA (Mar. 24, 2017), <https://verdict.justia.com/2017/03/24/complexities-motive-analysis-challenging-president-trumps-executive-order-regarding-entry-united-states>; Richard Hasen, *Does the First Amendment Protect Trump’s Travel Ban?*, SLATE (Mar. 20, 2017, 9:28 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/03/the\\_9th\\_circuit\\_s\\_alex\\_kozinski\\_defends\\_trump\\_s\\_travel\\_ban\\_on\\_first\\_amendment.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/the_9th_circuit_s_alex_kozinski_defends_trump_s_travel_ban_on_first_amendment.html); Dawn Johnsen, *Judicial Deference to President Trump*, TAKE CARE (May 8, 2017), <https://takecareblog.com/blog/judicial-deference-to-president-trump>; Heidi Kitrosser, *Is Speech from the Campaign Trail Relevant to Religious Discrimination Claims?*, ACSBLOG (Mar. 20, 2017), <https://www.acslaw.org/acsblog/should-elected-officials-be-held-accountable-in-court-for-campaign-speech> [<https://perma.cc/DA3U-6KYG>]; Eugene Kontorovich, *The 9th Circuit’s Dangerous and Unprecedented Use of Campaign Statements to Block Presidential Policy*, WASH. POST: VOLOKH CONSPIRACY (Feb. 9, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/09/the-9th-circuits-dangerous-and-unprecedented-use-of-campaign-statements-to-block-presidential-policy/>; Matthew Segal, *President Trump’s Campaign Promises Stick with Us—They Should Stick with Him, Too*, JUST SECURITY (Mar. 25, 2017), <https://www.justsecurity.org/39246/president-trumps-campaign-promises-stick-us-they-stick-him/>; Ilya Somin, *Thoughts on the Appellate Court Ruling Against Trump’s Immigration Order*, WASH. POST: VOLOKH CONSPIRACY (Feb. 10, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/10/thoughts-on-the-appellate-court-ruling-against-trumps-refugee-order/?utm\\_term=.871065525996](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/10/thoughts-on-the-appellate-court-ruling-against-trumps-refugee-order/?utm_term=.871065525996). The question has thus far attracted only limited attention within the legal literature. The issue has also received some treatment in several recent articles dealing with motives-based analysis more generally. *See, e.g.,* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 547–60, 571–78 (2018); Aziz Z. Huq, *Judging Discriminatory Intent*, 103 CORNELL L. REV. (forthcoming 2018) (manuscript at 45–47) (on file with author); Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. (forthcoming 2018) (manuscript at 39–41) (on file with author).

The most comprehensive work on the subject to date of which I am aware comes from Professor Shawn Fields, who has offered a deeply informed analysis of the role that campaign communications should play for purposes of establishing “discriminatory intent” under the doctrinal principles under the Equal Protection and Establishment Clauses. Shawn E. Fields, *Is It Bad Law to Believe a Politician? Campaign Speech and Discriminatory Intent*, 52 U. RICH. L. REV. 273, 273–74 (2018). Although Professor Fields and I arrive at similar conclusions regarding the

approach” to campaign communications as an indicator of government motive, contending that judges ought not be stopped from considering the former when gauging the latter. As applied to Trump and the travel ban, for instance, my prescribed approach would suggest that the evidentiary record should have included both those post-campaign statements about the ban that Trump made in his “official” capacity and any campaign-related statements that shed further light on the ban’s underlying purpose. I further suggest, subject to certain caveats outlined below, that the same approach should apply across the many doctrinal areas in which government motives can affect a law’s constitutional validity. To be clear, I make no specific claims about the *weight* that campaign communications ought to carry relative to post-campaign statements and other “official” indicators of government motive, and I acknowledge the possibility that post-campaign changes of course might sometimes suffice to overcome any adverse motive-based inferences that pre-election statements would on their own support. But I do maintain that campaign statements should at least count for something when it comes to identifying the government’s reasons for acting.

I develop the argument in three stages. In Part I, I identify the reasons why motives might matter within constitutional doctrine. Drawing on the voluminous prior literature on motives-based analysis in constitutional law, I suggest that “badly motivated” government action might qualify as constitutionally “worse” than innocently motivated government action because bad motivations: (1) create or contribute to “expressive” or “stigmatic” harms that are suffered by the public at large;<sup>14</sup> (2) increase the likelihood that government actions will generate other sorts of constitutionally undesirable outcomes;<sup>15</sup> (3) undermine the plausibility of any regulatory justifications the government has adduced on a law’s behalf;<sup>16</sup> and (4) are themselves violative of a fixed and independent “rule” or “principle”

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appropriateness of the inclusionary approach, we do so through analyses that differ in both methodological focus and substantive scope. In particular, whereas Professor Fields situates many of his claims *within* operative doctrinal principles of First and Fourteenth Amendment doctrine, see, for example, *id.* at 315–24, my analysis operates a somewhat more abstract level. As I explain further below, I am less interested in the question of whether campaign-cognizant motive review is *currently* permitted by operative Supreme Court doctrine as I am in the question of whether, as a theoretical matter, it *ought* to be so permitted. Second, and relatedly, I attempt here to paint with a broader brush—considering the evidentiary value of campaign communications not just within the particularized doctrinal context presented by the travel ban litigation, but also across *all* doctrinal contexts in which a particular type of motive has been proscribed or disfavored. In this respect, I believe the somewhat broader and more theoretical claims presented in this Article might usefully supplement the more targeted and doctrinally-grounded claims advanced in Professor Fields’s rich and illuminating work.

<sup>14</sup> See *infra* Section I.A.

<sup>15</sup> See *infra* Section I.B.

<sup>16</sup> See *infra* Section I.C.

associated with a given constitutional norm.<sup>17</sup> In developing this taxonomy, my aim is not to so much to defend the wide reach of motives-analysis within operative constitutional doctrine, but rather to sort through the different “types” of motives that courts might have good reason to care about. Specifically, I conclude that the first “expressivist” rationale for motives review favors an inquiry into the *objectively apparent* reasons for a law’s enactment, whereas both the “effects-based” and “justifications-based” rationales favor an inquiry into the *subjectively embraced* reasons for a law’s enactment.<sup>18</sup> The final, “rule-based” rationale, I concede, opens the door to a hodge-podge of other more possibilities.

Part II then turns to the relationship between government motives and statements from a campaign. Specifically, this Part defends the *evidentiary value* of campaign communications, contesting in particular the claim that statements by a mere candidate for office are irrelevant to the motives underlying official governmental action. I argue in particular that campaign communications can usefully inform inquiries into both *apparent motive* (by supporting inferences about the public’s own perceptions of a former candidate’s official actions),<sup>19</sup> and *actual motive* (by offering a form of first-person reporting as to the state of government official’s own values, opinions, and beliefs at an earlier point in time).<sup>20</sup> I also consider and reject the thesis that—insofar as the doctrine centers on “official” as opposed to “unofficial” motives for government action—campaign communications are inherently off-limits.<sup>21</sup> Such communications may qualify as “unofficial” in the sense that they do not themselves effectuate government policy, but that hardly prevents them from informing subsequent assessments of why official action was taken. Thus, regardless of the “type” of motive being sought, campaign communications will often carry meaningful evidentiary significance.

But arguments about evidentiary value do not alone establish the desirability of the inclusionary approach; we must further consider potential adverse consequences that might follow from its use. Part III considers three such consequences: first, the inclusionary approach might chill candidates’ speech during a campaign;<sup>22</sup> second, the inclusionary approach might preclude desirable (or even necessary) government action after a campaign;<sup>23</sup>

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<sup>17</sup> See *infra* Section I.D.

<sup>18</sup> This is consistent with Richard Fallon’s observation that a “variety of subjective and objective conceptions of forbidden legislative intent make appearances in constitutional doctrine.” Fallon, *supra* note 5, at 553; see also *id.* at 537–53 (charting different types of inquiries into legislative motive across different areas of doctrine).

<sup>19</sup> See *infra* Section II.A.

<sup>20</sup> See *infra* Section II.B.

<sup>21</sup> See *infra* Section II.C.

<sup>22</sup> See *infra* Section III.A.

<sup>23</sup> See *infra* Section III.B.

and third, the inclusionary approach might frustrate judicial efforts to achieve simplicity and predictability within constitutional doctrine.<sup>24</sup> These concerns are real, but they are in my view insufficiently compelling to warrant an absolute bar on campaign-cognizant motives review. There remains, after all, the very real benefit to be gained from the inclusionary approach—namely, that of incorporating relevant information within the constitutional record—and that benefit will sometimes outweigh whatever adverse effects the inclusionary approach might yield. The appropriate way to mitigate adverse consequences is for courts to keep those consequences in mind when implementing the inclusionary approach, not for courts reflexively to exclude even highly probative pieces of evidence for the simple reason that they materialized during a political campaign.

That, in a nutshell, is the argument this Article sets forth. But before moving forward, I should acknowledge two limitations in this Article's methodological approach.<sup>25</sup> First, this Article takes no position on the extent to which existing Supreme Court doctrine *already accommodates* the inclusionary approach. My own view is that the Court has left the issue largely unsettled,<sup>26</sup> although there are some pockets of doctrine that might seem to bear one way or the other on the question.<sup>27</sup> Others may be interested in reading these tea leaves in an effort to predict the course that future doctrine might take. My own concern, by contrast, is with what the doctrine *ought* to provide as a matter of sound constitutional law.

The second methodological limitation is also straightforward: For purposes of this Article, I am bracketing the question of whether courts ought to care about government motives in the first place. To be sure, in Part I of

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<sup>24</sup> See *infra* Section III.C.

<sup>25</sup> There is a further methodological point that I might as well acknowledge here: Although I recognize that some commentators regard the labels of “purpose,” “intent,” and “motive” as capturing subtly different ideas, see, for example, Fallon, *supra* note 5, at 534–35, I do not believe that any of those distinctions make a difference for purposes of the analysis I offer. Accordingly, and unless otherwise indicated, I use these terms interchangeably. See Kagan, *supra* note 6, at 426 (adopting a similar approach).

<sup>26</sup> *But see* Trump v. Hawaii, 138 S. Ct. 2392, 2438 n.3 (2018) (Sotomayor, J., dissenting) (“The Government urges us to disregard the President’s campaign statements. But nothing in our precedent supports that blinkered approach.”).

<sup>27</sup> For example, in *McCreary County v. ACLU*, the Court indicated that judges screening for sectarian purposes should not “turn a blind eye to the context in which [government] policy arose.” 554 U.S. 844, 866 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)). But the Court also there said that judges should “take[] account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act.” *Id.* at 866 (internal quotation marks and citations omitted). The Court also warned against “judicial psychoanalysis of a drafter’s heart of hearts.” *Id.* at 862; see also Fields, *supra* note 13, at 284 (noting, in the equal protection context, that “courts have largely limited their evaluation of the evidence to official governmental records and refused to consider ‘unofficial’ or ‘extra-official’ evidence of animus”).



this Article, I attempt to make some sense of motive-based constitutional rules, highlighting potential rationales and justifications for treating a law's animating motives as relevant to its overall constitutionality. But that analysis should not be mistaken for a comprehensive normative defense of motive analysis itself. My claim, rather, is that *to the extent that motives matter in constitutional law*, campaign communications should matter as well. I therefore do not grapple with the oft-cited threshold objections to motive-based constitutional rules, such as the objection that it is practically difficult (if not conceptually impossible) to attribute motives to government entities,<sup>28</sup> or the objection that motive-based rules are futile in operation because they too easily allow the government to “remediate” or “cure” previously unconstitutional laws.<sup>29</sup> These objections are important, and they may sometimes (if not always) provide a good enough reason for courts to ignore *all potential indicators* of government motive—including campaign communications—when implementing a given constitutional norm. But where those objections do not prevail, and where government motives therefore become an object of constitutional inquiry, courts ought to consider campaign communications alongside any other indicators of what motivated the government to act. Or so I will argue below.

### I. WHY MIGHT MOTIVES MATTER?

We begin with the question of why motives matter in constitutional law. What justifies the development of doctrinal frameworks that link the constitutionality of government action to the reasons for its implementation? We can state the question more precisely by considering governmental policies that are identical in substance but that appear to serve different governmental purposes. Imagine, for instance, that one jurisdiction has enacted a Sunday closing law because it wishes to promote rest and leisure, whereas another jurisdiction has enacted a Sunday closing law because it wishes to promote attendance at church. Similarly, imagine that two neighboring school districts have adopted equivalent school assignment schemes (with equivalent effects on the race-based composition of individual

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<sup>28</sup> See, e.g., J. Morris Clark, *Legislation Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 954 (1978) (noting that “[i]t is usually impossible to know the subjective motivation of legislators by direct evidence, such as legislative history, with enough certainty to declare a law unconstitutional as a result”); see also Fallon, *supra* note 5, at 531 (highlighting the “conceptual problem . . . involving the aggregation of the mental states of multiple officials into a collective intent of a decisionmaking body”). The aggregation-based difficulty, of course, does not apply where the relevant government entity is a single government official. See Shaw, *supra* note 13, at 37–39.

<sup>29</sup> See *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (noting that “there is an element of futility” in motive-based review, because “[i]f the law is struck down for this [motive-based] reason . . . it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons”).

schools), but that one district has done so for race-neutral reasons (for example, to minimize transportation and other costs) and that another district has done so for explicitly race-based reasons. Or imagine that two states have imposed identical weight restrictions on the vehicles that may use its roads, but that one state has done so in response to deteriorating road conditions and that the other State has done so in an effort to channel business to local trucking firms. In all these cases we want to know why the badly-motivated variant of each policy should qualify as more constitutionally suspect than its innocently-motivated counterpart. If each set of policies purports to do the same thing, then what basis exists for concluding that the policies should meet different constitutional fates?

In this Part, I posit four rationales for incorporating motives analysis into constitutional adjudication. First, motives might matter because they influence the “social meaning” of the laws to which they attach. On this *message-based* rationale for motive-based inquiry, courts should monitor for bad motives on the theory that badly-motivated laws can themselves “express” values and norms that conflict with core constitutional guarantees. Second, motives might matter because they furnish useful information about the likely consequences of the government’s actions. On this *effects-based* rationale, courts should monitor for bad motives on the theory that badly-motivated laws are, as a general matter, especially likely to impose salient constitutional harms on the public at large. Third, motives might matter because they can undermine the government’s credibility when it comes to adducing an objectively adequate justification for a suspect law. On this *justification-based* rationale, courts should monitor for bad motives on the theory that the bad motives can have a distorting effect on the government’s assessment of a law’s overall costs and benefits. Finally, motives might matter because the bad motives themselves are constitutionally prohibited. On this *rules-based* rationale for motive-based inquiry, courts should monitor for bad motives on the theory that badly-motivated laws, because they are badly-motivated, violate a principle of independent constitutional significance.

#### A. *Bad Motives Send Bad Messages*

Motives might matter because they influence the “message” communicated by a constitutionally challenged law. As expressivist theorists have long recognized, laws exert influence not just by adjusting rights, duties, and powers among the parties that they regulate, but also by signifying the values, priorities, and beliefs of the communities that create them.<sup>30</sup> In this way two laws might end up doing the same thing while “saying” different things. One anti-leafletting ban, for instance, might signify a community’s

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<sup>30</sup> See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of the Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

fondness for tidy sidewalks; another might signify a community's hostility towards unpopular speakers. Not every law need communicate a message, and not every such message will itself be easy to discern.<sup>31</sup> But, just as it sometimes true that we "don't need a weatherman to know which way the wind blows,"<sup>32</sup> so too will it also be true that members of a political community can develop a reasonable sense as to what a given law is "all about."<sup>33</sup>

Courts might care about a law's expressive significance for a variety of reasons. Some laws' messages might inflict harm on others; if a law expresses animus or hostility, the expression itself will heighten feelings of stigma, isolation, and fear within various segments of the political community.<sup>34</sup> Similarly, bad expressive messages might embolden and legitimate harmful forms of behavior by private parties,<sup>35</sup> as might happen, for instance, when a government's overt endorsement of racial or religious stereotypes causes private parties to embrace and act upon those same stereotypes.<sup>36</sup> Further, the bad messages reflected by one law might conflict with the good messages reflected by another; problems can arise when one set of nonconstitutional enactments ends up signaling acceptance or approval of values that the Constitution itself condemns.<sup>37</sup> In these various ways, the content of a law's

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<sup>31</sup> See Craig Konnoth, *An Expressive Theory of Privacy Intrusions*, 102 IOWA L. REV. 1533, 1542 (2017) (noting that "different segments of the community may attach different meanings to state action depending on their own background").

<sup>32</sup> BOB DYLAN, *Subterranean Homesick Blues*, in BRINGING IT ALL BACK HOME (Columbia Records 1965).

<sup>33</sup> Cf. Todd Rakoff, *Washington v. Davis and the Objective Theory of Contract*, 29 HARV. C.R.-C.L. L. REV. 63, 76 (1994) (noting that "the need to attribute meaning to words or acts, and to differentiate according to the meaning attributed, occurs throughout the law").

<sup>34</sup> See, e.g., Fallon, *supra* note 5, at 530 (noting that statutes might carry an "objective 'expressive' effect that stigmatizes a racial or religious minority or promotes religion to a greater than de minimis extent").

<sup>35</sup> Some laws, by contrast, might send positive messages that influence social behavior in a desirable manner. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2026 (1996) (hypothesizing that "an appropriately framed law may influence social norms and push them in the right direction").

<sup>36</sup> Charles Black alluded to this problem in his famous defense of *Brown v. Board of Education*. As Black explained:

[S]egregation is the pattern of law in communities where the extralegal patterns of discrimination against Negroes are the tightest, where Negroes are subjected to the strictest codes of "unwritten law" as to job opportunities, social intercourse, patterns of housing, going to the back door, being called by the first name, saying "Sir," and all the rest of the whole sorry business. Of course these things, in themselves, need not and usually do not involve "state action," and hence the fourteenth amendment cannot apply to them. But they can assist us in understanding the meaning and assessing the impact of state action.

Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425 (1960).

<sup>37</sup> See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 507 (1993) ("Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values."); see also Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 14 (2000) (positing an expressive theory of equal protection under which "stigma or psychological injury is

expressive message might have some bearing on its overall constitutional appropriateness.

That point has not been lost on the Court, whose members have sometimes embraced expressivist logic when deciding constitutional cases. In equal protection cases, the Court has noted that segregationist laws “denot[e] the inferiority” of racial minorities,<sup>38</sup> that gender-discriminatory laws can “perpetuate . . . stereotyped view[s],”<sup>39</sup> and that prohibitions on same-sex marriage can “ha[ve] the effect of teaching that gays and lesbians are unequal in important respects.”<sup>40</sup> Race-based gerrymandering can similarly “reinforce[ ]” and “perpetuat[e]” race-based stereotypes.<sup>41</sup> In Establishment Clause cases, Justice O’Connor expressed similar concern about religion-endorsing laws, worrying about their tendency to “send[ ] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>42</sup> In substantive due process cases, the Court in *Lawrence v. Texas* characterized a Texas anti-sodomy law as “demean[ing] the[ ] existence” of the petitioners “by making their private sexual conduct a crime.”<sup>43</sup>

We can elsewhere debate the extent to which (and the means by which) courts should consider expressive variables when deciding constitutional cases.<sup>44</sup> The point here, however, is simply that once the expressive message of a law has assumed constitutional significance, then so too should the motives of the law’s enactors. Message derives from motive: to discern what

not a necessary component of an Equal Protection violation”). In addition, Donald Regan has argued that overtly protectionist legislation is constitutionally problematic for the simple reason that its protectionist message is “antithetical to the very idea of federal union.” Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1126 (1986); see also Anderson & Pildes, *supra* note 30, at 1554 (citing to Regan while arguing that “protectionist legislation expresses a constitutionally impermissible attitude toward the interests of other States in the political union”).

<sup>38</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (internal quotation marks omitted); see also *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) (“[E]very time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”).

<sup>39</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (noting that a Mississippi university’s policy of “excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job”).

<sup>40</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

<sup>41</sup> *Shaw v. Reno*, 509 U.S. 630, 647–48 (1993).

<sup>42</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

<sup>43</sup> 539 U.S. 558, 578 (2003).

<sup>44</sup> For a dissenting viewpoint regarding the value of the expressivist project, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1376 (2000) (criticizing expressivism on the ground that “[t]he connection between the linguistic meaning of a legal official’s action and what truly matters, morally speaking, about that action, is a purely contingent connection”).

a law “signifies” to the public at large, courts often need to know something about the reasons why the law came into being.<sup>45</sup> Thus, for instance, if lawmakers enacted a facially neutral law for race-based reasons, that law is more likely to “express” a harmful race-based message than is an otherwise similar law that was intended to further a race-neutral objective. So too for laws enacted for protectionist reasons, religion-promoting reasons, speech-suppressing reasons, or any other set of reasons that might give cause for constitutional concern. Motive, to be not sure, may not always bear on a law’s expressive significance; some enactments may simply “speak for themselves” in this regard. And motive itself will not always be determinative or clarifying when it comes to defining the message that a law communicates. But, to the extent courts are interested in trying to figure out the “message” that a law communicates, motive-based analysis will often prove to be a valuable tool.

But the motives made relevant by the “message-based” rationale are limited in one important respect. Specifically, the rationale accords relevance only to the *objectively apparent* motives for a law’s enactment; it provides no good reason for caring about governmental motives kept hidden from public view.<sup>46</sup> Expressive harms depend on the meaning that citizens attribute to government action, and that meaning—by definition—will depend entirely on the motive-based evidence that the public itself has seen. If government officials secretly favor a law because they believe it will subordinate atheists, while publicly explaining, defending, and promoting the law on nonsectarian grounds, it will be hard for a challenger to argue that the officials’ private motives themselves imposed a stigma on non-believers.<sup>47</sup>

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<sup>45</sup> To be clear, the claim here is not that bad motives are a *necessary* condition for the expression of a bad message. In some circumstances, even a law passed for innocent reasons might nonetheless express a constitutionally problematic message. Rather, the claim is simply that a motive-based inquiry will help to inform a court’s judgment as to what a law turns out to express. See Hellman, *supra* note 37, at 59 (“[T]he assessment of expressive character takes the motives of those who enact the legislation . . . as only one data point in the analysis.”).

<sup>46</sup> See Anderson & Pildes, *supra* note 30, at 1525 (“The expressive meaning of a particular act or practice . . . need not be in the agent’s head, the recipient’s head, or even in the heads of the general public. Expressive meanings are socially constructed.”); Fallon, *supra* note 5, at 549 (characterizing an expressivist conception of intent as “the communicative significance that a competent, informed participant in a society would attach to a statute as an indicator of prevailing societal values”); Rakoff, *supra* note 33, at 76 (suggesting that, on an objective re-formulation of the discriminatory intent requirement, “[w]e are not really that interested in whether our officials have good or bad souls,” but rather “in whether official action is demeaning of a minority”).

<sup>47</sup> See *McCreary Cty. v. ACLU*, 545 U.S. 844, 863 (2005) (“If someone in the government hides religious motive so well that the objective observer, acquainted with the text, legislative history, and implementation of the statute, cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides. A secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate

By the same token, if public officials privately favor a law for race-neutral reasons, while cynically using race-based rhetoric to drum up public support for the law, their private feelings of race-neutrality will do nothing to mitigate the law's stigmatic effects. If motives matter because of the public messages lawmakers generate, then the motive-based inquiry must confine itself to only those motives that the public believes to animate the law under review.

### B. *Bad Motives Yield Bad Outcomes*

We have already seen one way in which a law's underlying purposes might influence its real-world impact: By shaping the social meaning of the laws to which they attach, bad government motives might contribute to expressivist harms that follow from public understandings of the message that it sends. But there is another sense in which motives and effects interrelate: Badly motivated laws, on balance, are more likely to generate bad constitutional outcomes.<sup>48</sup> Even if government motives do not themselves give rise to harm, the motives might nonetheless correlate with policies that yield adverse effects. That correlation, even if imperfect, would provide courts with a further reason to consider the government's reasons for acting. By asking whether a law derived from a permissible or impermissible governmental purpose, courts would be gauging—albeit indirectly—the law's likelihood to alter the regulatory status quo in a constitutionally problematic way.

This idea finds expression in Elena Kagan's discussion of motive-based analysis within First Amendment law. In a well-known law review article from 1996, then-Professor Kagan identified within free-speech doctrine a variety of different rules and tests that operated as “devices to detect the

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effect of advancing religion.” (internal quotation marks and citations omitted)).

<sup>48</sup> One could, of course, characterize the message-based rationale as subsumed by the effects-based rationale, at least insofar as the message-based rationale highlights a type of bad outcome to which badly-motivated enactments can give rise. But I believe that the categories are usefully distinguished, for two reasons. First, as noted, the message-based rationale supports an inquiry into *apparent* government motives, whereas—as we will see below—a rationale premised on non-expressivist outcomes supports an inquiry into actual motives. See *infra* text accompanying notes 73–77. Second, the message-based rationale, unlike the outcome-based rationale, can itself be articulated in non-consequentialist terms; that is, one might worry about the “bad messages” sent by a badly-motivated law for reasons that have nothing to do those messages’ harmful effects. See, e.g., Hellman, *supra* note 37, at 14 (advancing an expressivist claim that “explicitly denies that the wrong is rooted in consequentialist concerns); see also Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 568 (2003) (contrasting a “consequentialist” account of expressive harm, which “looks at the communicative impact of a law or legal regime,” with a “revelatory” account, which “raises the problem of expressive harm . . . not by having some practical communicative impact on society, but by expressing, in the sense of *winning*, the worldview of the state actor that made the law”).

presence of illicit motive.”<sup>49</sup> One justification for the doctrine’s emphasis on motive, Kagan suggested, had to do with the correlation between bad motives and bad consequences: Courts might sensibly screen for illicit governmental purposes as a means of capturing those laws most likely to effectuate bad free-speech policy. If, for instance, the aim of the First Amendment is to preserve “[a] state of public discourse . . . most illuminating to and desired by an ideally curious and engaged audience,”<sup>50</sup> then courts should be especially hesitant to uphold any law whose underlying purpose is to suppress or punish the expression of certain ideas. The problem with such a law lies not in the “censorial motive” itself; rather, it lies in the very real risk that the law will succeed at achieving its enactors’ aims: As Kagan puts it, “[w]hen self-interest or ideological hostility enters into a restriction on speech, the odds increase that the resulting action will impoverish the sphere of public discourse.”<sup>51</sup> Consequently, judicial efforts to eliminate badly-motivated restrictions on speech might indirectly operate to “promote the set of outcomes that the audience-based model deems desirable.”<sup>52</sup>

At first glance, as Kagan herself acknowledges, probing for problematic motives seems like a “strangely circuitous” way of probing for problematic effects.<sup>53</sup> After all, if effects are what we care about, courts could simply evaluate those effects directly and on their own terms.<sup>54</sup> Nonetheless, as Kagan notes, a direct inquiry into the nature of a law’s effects will sometimes prove infeasible or at least difficult to conduct, such that even an indirect, motive-oriented proxy for effects will sometimes prove useful.<sup>55</sup> Regarding speech prohibitions and public discourse, for example, courts may “not possess a fully developed sense of what an optimal marketplace of ideas would look like,” and thus rely on effects-based standards that are “insufficiently definite and detailed to lend themselves to direct application.”<sup>56</sup> Where this is so, the “focus on motive” can “provide[] an indirect way of identifying

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<sup>49</sup> Kagan, *supra* note 6, at 416; *see also* Lawrence A. Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 931 (1978) (noting that a forbidden motive “undoubtedly is selected because of the social effects associated with it”); Ristroph, *supra* note 4, at 1385 (noting the view that “by basing legal liability on certain intentions, we can prevent or reduce the bad results associated with those intentions”); Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191, 198 (2008) (“The everyday notion that people who aim at bad states of affairs are likely to bring them into existence goes a long way to justify concern with motives.”).

<sup>50</sup> Kagan, *supra* note 6, at 507.

<sup>51</sup> *Id.* at 507–08.

<sup>52</sup> *Id.* at 508.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; *see also* Young, *supra* note 49, at 238 (“Let us recall once more that while a consequentialist would prefer to go straight to an assessment of consequences by skipping reasons, this is not practically possible. The particular consequences of an action may be impossible for a court to see, and even political branch actors cannot see the results comprehensively.”).

actions with untoward effects on public discourse.”<sup>57</sup>

Kagan’s point applies directly to free speech review, but it is not difficult to see how a similar relationship might hold in other doctrinal contexts. In Dormant Commerce Clause litigation, the presence or absence of protectionist motives may prove useful in determining whether a state regulation is likely to balkanize the interstate marketplace. In the abortion context, lawmakers’ desire to erect “substantial obstacles” to pre-viability abortions may provide extra reason to worry about a law’s tendency to do just that. And in other areas of the law, officials’ reasons for acting might bolster (if not wholly confirm) suspicions about the consequences of their actions.<sup>58</sup> To be sure, sometimes those consequences will be sufficiently self-evident as to obviate the need for any inquiry into motive at all. But where there exists uncertainty about the scope and extent of a law’s outcomes, the government’s expressed desire to produce those outcomes should qualify as a reason to worry about those outcomes coming to pass.

Suppose, then, that we choose to scrutinize government motive in an effort to better understand a law’s likely on-the-ground effects. What sort of inquiry should we conduct? Here, we should train our focus on actual rather than apparent motives. We should strive to discern the true animating objectives of government officials, and we should not care whether those objectives were hidden away or widely disclosed. In contrast to the messaging-based rationale for motive analysis, the effects-based rationale depends only on a factual inference that flows straight from the motives of lawmakers to the consequences of the laws they enact. In other words, what matters on the effects-based rationale is the simple fact of the government’s commitment to a given regulatory purpose: it is that commitment—and not anything that government officials have said or done in relation to that commitment—that makes the bad outcomes more likely. Consequently, if we are interested in drawing effects-based inferences from evidence of government motive, we will need to see evidence that identifies the true animating forces that motivated the government to act.

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<sup>57</sup> Kagan, *supra* note 6, at 509.

<sup>58</sup> Ben Sachs has suggested, for instance, that motive-based inquiries might helpfully support effects based inferences within certain areas of labor preemption analysis. See Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1154, 1214 (2011) (“[B]y identifying, for example, legislation passed with improper motives (that is, passed because of the legislation’s effect of reordering organizing rules), it might be possible to smoke out legislation that has impermissible effects.” (citing Kagan, *supra* note 6, at 507–08)); see also *id.* at 1214 n.304 (“[E]ven if preemption analysis is concerned solely with a state action’s ‘effect on federal rights,’ motive analysis might be an approach to determine these effects.”).



### C. *Bad Motives Reveal Bad Justifications*

The previous Section considered the relationship between bad motives and negative constitutional effects. But motives might also figure into the equation by helping courts to evaluate the extent of any countervailing benefits that might help to *justify* those effects. Call this the “justification-based” rationale for motives analysis. Courts often must determine whether a challenged law is sufficiently well-tailored to serve a sufficiently important regulatory objective, and they therefore must often decide whether to credit a government’s claim that a challenged law works well to serve an objectively valid regulatory need.<sup>59</sup> A law enacted to achieve an illegitimate objective can obviously not be justified by reference to the illegitimate objective itself. But more than that, evidence of that bad motive may frustrate the government’s efforts to justify a law by reference to an altogether separate, and potentially more legitimate end. As Professor Gordon Young has elsewhere put the point, “the presence of an illegitimate mental state animating an action might correlate at a usefully high level with the absence of any alternative and sufficient objective reason for such action, were courts to search extensively for such reasons.”<sup>60</sup>

We can illustrate the idea with a hypothetical. Suppose I have recently decided to cancel a late-semester class and that you have been asked to determine whether there exists a valid justification for my doing so. Suppose further that you know the actual reason why I’m pursuing the cancellation—I want to attend the opening day of “Jazz Fest” in New Orleans—and you are quite confident that this is a bad reason for canceling class. Not contesting that conclusion in any way, I nevertheless posit an alternative justification for my decision. Regardless of why I actually canceled class, I argue, the cancellation is a good and appropriate thing. My students, I explain to you, have become mentally exhausted by the crushing workload, and a day off from class will afford them a much-needed opportunity to catch their collective breath before getting ready for exams. Consequently, even though my decision to cancel class may have been badly motivated, it turns out that the cancellation will enhance the well-being of my students and—by extension—their performance on my exam. And that happy outcome, I argue, should wholly suffice to validate my decision after the fact.

Now, it may or may not be true that my decision would have this salutary effect (and it may or may not be true that this salutary effect would in any event suffice to justify the cancellation). But put those issues to one side. The central point here is that you should be highly skeptical of my representation to you that the effect is likely to occur. My improper motives for canceling class have

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<sup>59</sup> See Michael Coenen, *More Restrictive Alternatives*, 96 N.C. L. REV. 1, 3 (2017) (describing the mechanics of means/ends analysis).

<sup>60</sup> Young, *supra* note 49, at 240.

rendered me an unreliable spokesperson for that position. And that remains so even if you might normally defer to me on matters of student wellbeing and pedagogical need. The problem is that my desire to attend Jazz Fest has likely distorted my own assessment of these issues, such that my arguments look less like the product of a dispassionate assessment of matters within my expertise and more like manufactured, post-hoc rationalizations for a decision that was already made. In particular, you should worry that I am articulating not so much the end-product of a serious pedagogical inquiry as I am a preordained conclusion that my inquiry was reverse-engineered to produce.

This hypothetical illustrates another reason why courts might care about government motive: Specifically, it suggests that the government's past attachment to bad motives can have *credibility-undermining effects* on whatever justifications the government might invoke on a law's behalf. Judges lack the time, expertise, and institutional capacity necessary to examine from scratch the overall importance of a regulatory interest and/or the degree of a law's means/ends fit. As a result, they will often hesitate to question the government's own representations as to the extent of the need and the degree of the fit.<sup>61</sup> But even if such concerns might support a default posture of judicial deference to claims of regulatory need, so too might particularized concerns about government motive support an occasional override of the default. More specifically, evidence of bad motives gives the court reason to worry about the government's credibility as a communicator of high-quality justifications. Having harbored invidious motives when it put the law into place, the government has forfeited its presumed credibility in invoking any other objective on the law's behalf.<sup>62</sup> The finding of bad motive, as Professor Young again puts it, "impeaches the trustworthiness of the political branches in a way that disqualifies them from making such judgments in the usual de facto final way."<sup>63</sup>

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<sup>61</sup> Courts often admit to doing this, for instance, when the government defends its measures on grounds related to public safety or national security. As the Court itself has acknowledged, "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people," and it is therefore "vital in this context not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (internal quotation marks omitted) (quoting *Boumediene v. Bush*, 553 U.S. 723, 797 (2008); *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)); see also *id.* at 33 ("Th[e] evaluation of the [national security-related] facts by the Executive, like Congress's assessment, is entitled to deference.").

<sup>62</sup> Professor Ely alluded to this idea when he suggested that the Court's identification of badly-motivated action should "make it somewhat skeptical of claims of a subsequent change of heart." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 138 (1980). Here, to be sure, the credibility-undermining effect of a demonstrably bad motive goes to a somewhat different question—namely, whether the government has eliminated its embrace of a suspect motive when attempting to re-enact a policy. But the connection between past bad motives and present-day credibility is largely the same.

<sup>63</sup> Young, *supra* note 49, at 240. Paul Brest may have had a similar idea in mind when he set forth his

This observation might help to account for the Court’s practice of subjecting certain types of laws to heightened scrutiny—demanding, in effect, that the government satisfy a higher-than-normal justificatory burden when it discriminates on the basis of certain “suspect” classifications. The Court has explained its willingness to strictly scrutinize laws that discriminate on the basis of race, alienage, and national origin by pointing out that “[such] factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.”<sup>64</sup> These types of classifications, the argument goes, are likely to reflect (or provoke) biased, prejudicial, or stereotype-driven modes of thinking. Consequently, officials who formulate policies by reference to such classifications should receive a level of deference that is less than what they normally would receive. To be sure, bad motives need not *always* accompany the use of suspect classifications; it is certainly possible to rely on race-based distinctions without embracing discriminatory animus.<sup>65</sup> Nevertheless, we might regard the risk of bad motives as high enough to warrant an across-the-board presumption to that effect—one that simply stipulates a connection between suspect classifications and improper regulatory aims.<sup>66</sup> And with that stipulation in place, the need for heightened scrutiny becomes evident: The strong possibility that bad motives entered into the government’s decision-making calculus militates against reflexive deference to the government when it attempts to justify the law in court.<sup>67</sup>

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own approach to motive-based judicial review, although Brest’s account was not articulated in quite such explicitly consequentialist terms. See Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 116–17 (“In our governmental system . . . only the political decisionmaker—and not the judiciary—has general authority to assess the utility and fairness of a decision. And, since the [badly-motivated] decisionmaker has (by hypothesis) assigned an incorrect value to a relevant factor, the party has been deprived of his only opportunity for a full, proper assessment.”).

<sup>64</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985); see also *id.* at 440–41 (justifying intermediate scrutiny for sex- and gender-based laws on the ground that “statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women”).

<sup>65</sup> The Court itself has suggested as much. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding a race-conscious admissions program on the ground that it was narrowly tailored to serve a compelling state interest).

<sup>66</sup> See ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 26 (2002) (“The doctrine of suspect classification rests on a judgment that, whenever a classification of a certain sort is used, a court is justified in presuming that ‘a motivating factor in the decision’ was the illicit motive ordinarily associated with that classification in the minds of at least some of the citizenry.”).

<sup>67</sup> The analytical relationship I have described here bears an uneasy relationship to the oft-cited suggestion that “strict scrutiny” and other forms of heightened means/ends analysis serve the purpose of smoking out improper motives. See, e.g., ELY, *supra* note 62, at 145–48 (suggesting that “special scrutiny,” and in particular its demands for a close fit between classification and the asserted legislative goals “turns out to be a way of ‘flushing out’ unconstitutional motivation”); Kagan, *supra* note 6, at 414 (arguing that “First Amendment law . . . has as its primary, though

unstated, object the discovery of improper governmental motives”); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 428 (1997) (noting that “[o]ne powerful function of strict scrutiny has always been that of ‘smoking out’ invidious purposes masquerading behind putatively legitimate public policy”); *see also* Coenen, *supra* note 59, at 47–51 (suggesting that courts might sometimes utilize means/ends analysis for the purposes of questioning the sincerity of the government’s commitment to a given regulatory objective). *But see* Nelson, *supra* note 5, at 1843 (noting that “neither Justice Stone nor the rest of the Court seems to have understood heightened scrutiny as a way of detecting unconstitutional motivations,” and that “[a]s originally applied, the *Carolene Products* idea was more about effects than about purposes”); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 394–97 (2006) (suggesting that, within the context of First and Fourteenth Amendment review, the Justices initially conceptualized means/ends analysis as a “jurisprudence of cost-benefit analysis, not motive discovery”). On this view of the inquiry, motive-based findings should operate as an output rather than an input of a court’s application of a means/ends test. Thus, in contrast to my account here, which sees evidence of illicit intent as *contributing* to a finding that the government’s regulatory justifications are weak, the “motives as object” account sees a conclusion that the government’s regulatory justifications are weak as contributing to a finding that a law derived from illicit motives in the first place. And the latter account raises an apparent difficulty with the logic of treating motive-based evidence as relevant to an assessment of regulatory justifications. That is, if the whole point of a means/ends analysis is to reveal the existence of bad government motives, then my argument posits a circuitous and potentially even circular means of achieving this result: bad subjective motives point to weak objective justifications which in turn point back to bad subjective motives.

I concede that if the whole point of a means/ends test is to support a conclusion about bad motives, then direct evidence of bad motive might sometimes obviate the need to engage in any means/ends analysis at all. At the same time, one can imagine scenarios in which motive-based inputs might usefully inform the Court’s application of a motive-centered means/ends test. In particular, the Court might begin its application of the test with tentative (but not dispositive) evidence that a law derived from bad motives. That evidence, though not sufficient in isolation to warrant an invalidation of the law, would at least suffice to justify reduced judicial deference to the government’s claim of regulatory need. Withholding such deference, the Court might then discover that the challenged law is in fact severely over- and/or under-inclusive with respect to the regulatory interest on which the government’s justification relies. Initial suspicions of bad motive would thus help to reveal the weakness of the government’s own justification, which would in turn function to confirm that those suspicions were in fact correct. In that way, even if a conclusion about bad motives is the overarching goal of the inquiry, initial evidence of bad motive might usefully drive that inquiry forward. The analytical relationship between motives and justifications need not proceed in exclusively one direction. Inferences about motives and assessments of justifications might instead reinforce one another in an iterative, back-and-forth-type fashion.

What is more, there are difficulties with characterizing the means/ends analysis as exclusively centered on the goal of smoking out bad motives. For one thing, at least some forms of means/ends analysis quite explicitly leave open the possibility that a law might withstand constitutional scrutiny *even if* the government had bad reasons for enacting it. This is most obviously true with respect to rational basis review. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (noting that, for purposes of rational-basis review, “[w]here . . . there are plausible reasons for Congress’[s] action, our inquiry is at an end,” and that “[i]t is, of course, ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.’”). But the principle arguably holds in connection with some applications of heightened scrutiny as well. *See, e.g.*, Fallon, *supra* note 5, at 556 (“In a number of cases the Supreme Court has held that a finding of discriminatory or otherwise forbidden legislative intent will provoke strict judicial scrutiny but not necessarily require a statute’s invalidation, regardless of issues of but-for causation.”). That approach makes sense if one conceptualizes means/ends analysis as a sort of “weighted balancing test,” whose ultimate object relates not to the presence or absence of bad motives, but rather to the question of whether a law’s regulatory benefits are significant enough to warrant tolerating its adverse constitutional effects.

Like the effects-based rationale, the justification-based rationale supports a particular type of motive-based inquiry—one that, once again, focuses on actual rather than apparent motives. The relationship between bad motives and bad justifications stems from the trustworthiness of the government itself; the government’s motives matter because they diminish our willingness to accept at face value the government’s statements of regulatory need. And that being so, it is the motives the government did in fact embrace—rather than motives it might have seemed to embrace—that courts ought to care about. If, for instance, government actors never seriously regarded a law as a necessary public-safety measure (while advertising it as such to the public at large), then courts would have no reason to trust any subsequent claims by the government that the law really does promote community safety in an important way. Conversely, if government actors secretly regard a law as a necessary public-safety measure (while cynically drumming up support for it with appeals to prejudice and stereotype), then courts would have no reason to doubt the seriousness of the government’s safety-related concerns. (To be clear, in this latter scenario, the bad apparent motives might still justify a decision to invalidate the law, but they would do so on grounds unrelated to the law’s effectiveness as a public safety measure.) To the extent that courts consider governmental motives for the purpose of calibrating the level of deference to the government’s claim of regulatory need, they should therefore want to know what *actually* motivated the government to do what it did.

#### D. *Bad Motives Are Bad Motives*

The discussion thus far has canvassed instrumentalist reasons for attending to the motives of government decision-makers, highlighting ways in which motive-based inquiries will help courts to achieve some broader constitutional goal. Sometimes, however, this discussion may be largely beside the point. That is, badly motivated government action might itself amount to a constitutional wrong, separate and apart from whatever “messages” it might send, whatever outcomes it might presage, and whatever justifications it might undercut. Call this the “rule-based” rationale for motive-based inquiry. On this account, courts must screen for bad motives for the simple reason that they violate a rule against bad motives.

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*See, e.g.,* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1306–08 (2007) (developing this account); *see also* Rubinfeld, *supra* note 67, at 428 (acknowledging that within certain areas of doctrine, strict scrutiny has become “a cost-benefit test measuring whether a law that falls (according to the Court itself) squarely within the prohibition of the equal protection guarantee is justified by the specially important social gains that it will achieve”). Obviously, on such a “weighted balancing” account of the means/ends test, there would be nothing redundant or circuitous about a court relying on motive-based inferences for purposes of demonstrating the weakness of a law’s underlying justification.

This might be true in one of two senses. First, depending on one's adjudicative methodology, certain *sources* of constitutional law—such as text, history, or structure<sup>68</sup>—may simply command attention to motives when certain types of cases arise.<sup>69</sup> We could inquire into the reasons underlying that command, but the soundness of those reasons won't have any bearing on the fact that the command must be followed. If I am tasked with applying a constitutional rule that prohibits the wearing of green hats, the rule itself is all I need to tell me that red hat-wearing is legally out of bounds. I can validly distinguish between green hat wearers and non-green hat wearers without ever developing a satisfactory account as to why the former are “worse” than the latter. By the same token, some sources of constitutional law may simply compel the conclusion that some badly-motivated forms of governmental action are more problematic than innocently-motivated actions that are otherwise equivalent. If so, that is all we need to know.

Second, and more broadly, bad motives may offend some non-consequentialist principle, norm, or value that we associate with a given constitutional provision. Kagan has suggested, for instance, that any governmental effort to “limit speech based on its sense of which ideas have merit” would problematically “expropriate an authority not intended for it and negate a critical aspect of self-government.”<sup>70</sup> Justice Harlan's famous dissent in *Plessy v. Ferguson* articulated a similarly non-consequentialist rationale for a strict bar on race-based government action; such action, Harlan famously contended, offends the idea that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>71</sup>

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<sup>68</sup> I am excluding precedent from this list because—unlike considerations mandated by text, history, and structure—considerations mandated by precedent are only as strong as the *stare decisis* norms that make the precedent binding. Given the always-present possibility of overruling precedent, precedent-based considerations—unlike text-based, history-based, or structure-based mandates—may require some level of extrinsic validation in order to retain their force. The more arbitrary-seeming the precedent, the greater the risk of abandonment by a subsequent court—even a court whose Justices are steadfastly committed to the common law method. *Cf.* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (noting that a departure from *stare decisis* may be justified where “related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine,” or where “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”). Contrastingly, if strong textual, historical, or structural evidence points to an arbitrary-seeming rule, the arbitrariness of the rule itself provides no reason for rejecting it on textual, historical, or structural grounds.

<sup>69</sup> *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in the judgment) (observing that “the secular purpose requirement [of the *Lemon* test] is squarely based in the text of the Establishment Clause it helps to enforce”). Of course, the argument can work in the opposite direction as well, with courts citing to text-based, historical-based, and/or structural considerations as categorically *foreclosing* inquiry into governmental motive. *See, e.g.*, *Hansen v. United States*, 65 Fed. Cl. 76, 81 (2005) (noting that “the plain meaning of the Takings Clause . . . contains no state of mind requirement”).

<sup>70</sup> Kagan, *supra* note 6, at 513.

<sup>71</sup> 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); *see also* Patrick S. Shin, *Diversity v. Colorblindness*,

Surveying the landscape more generally, Richard Pildes has suggested that many constitutional norms require courts to “determin[e] whether government’s reasons for acting are consistent with the kind of reasons that make acts of political authority in a particular sphere legitimate.”<sup>72</sup> In these and other ways, courts might condemn the government for relying on some inference that it has no business relying on or for pursuing some goal that it has no business pursuing. And in so doing, courts would have no need to justify the prohibition of bad motives by reference to anything other than the badness of the motives themselves.

In contrast to its message-based, results-based, and justification-based counterparts, the rule-based rationale for motives analysis does not identify a single “type” of motives analysis that courts must conduct. Rather, on this rationale, the nature of the motive-based inquiry will depend on the particular rule or principle mandating the inquiry. We are here positing not a single, universal mandate that flatly condemns all “badly”-motivated action across the board, but rather a collection of substance-specific mandates that mark out particular types of “bad” motives for particular reasons—reasons whose persuasiveness, moreover, will vary depending on the methodological and philosophical proclivities of the judge deciding the case. That being so, there is no “one right manner” in which all rule-based inquiries into motive must proceed. Some rules or principles may demand inquiry into apparent motives but not actual motives; other rules or principles may demand inquiry into actual motives but not apparent motives; and still other rules or principles may demand inquiry into combinations or variations of the two. The important point for now is simply that, unlike the other rationales we have considered, the rules-based rationale permits little in the way of generalized prescription and analysis. If a court has inquired into motives because some rule requires it to do so, the adequacy of the court’s inquiry will depend on the particularities of the rule itself.

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2009 BYU L. REV. 1175, 1211 (2009) (characterizing Harlan’s argument as “invok[ing] the fundamental, non-instrumental norm of equal respect”).

<sup>72</sup> Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 714 (1994).

Having identified the various rationales for motive-based analysis in constitutional law, let us now turn to the specific question that this article poses: *Should campaign communications inform courts' assessment of government motives?* Assuming that some area of doctrine has identified certain types of motives as suspect or altogether proscribed, we want to know whether courts may look to an official's campaign communications when asking whether those motives exist. The question, to repeat, is not whether motive-based analysis itself is a good idea. Rather, it is whether motive-based analysis ought to proceed in a manner that accords no relevance to statements made in connection with an electoral campaign. Can one justifiably contend that motives should matter but campaign communications should not?

One might attempt to do so in two different ways. The first justification would appeal to considerations of *relevance* and *evidentiary value*; in essence, this argument would contend that campaign communications tell us nothing useful about government motives and ought therefore to be shunned. The second justification, by contrast, would appeal to considerations of *regulatory effect*; even if campaign communications might sometimes prove relevant, this argument would contend that intolerable results would follow from courts giving them evidentiary weight. The next two Parts address each argument in turn.

## II. THE EVIDENTIARY VALUE OF CAMPAIGN COMMUNICATIONS

In the previous Part, I identified four different reasons why courts might care about motives when evaluating the constitutionality of government action. I also suggested that these different *rationales* for motive analysis were likely to give rise to different *forms* of motives analysis, with the type of motive to be identified largely based on the reasons why a court cares about motives in the first place. More specifically, I suggested that: (a) the messages-based rationale supports an inquiry into the publicly apparent reasons for a law's enactment; (b) both the effects-based and justifications-based rationales support an inquiry into the subjectively embraced reasons for a law's enactment; (c) and that the rules-based rationale leaves open a range of different possibilities.

In assessing the evidentiary value of campaign communications, it will therefore be helpful to separate out the different types of motives for which courts might screen. Taking that approach, this Part begins by considering the relationship between campaign communications and "apparent motives"—one as to which I think the most straightforward case for an evidentiary linkage can be made. This Part then considers the relationship between campaign communications and "actual motives," concluding that here too, despite some complications, campaign communications can provide useful information regarding the government's "true" reasons for



acting. Finally, this Part concludes by considering the various forms of motive analysis that might fall under the rubric of the rule-based account. Here, in particular, I acknowledge the possibility that the operative rule might define the proscribed motives in such a way as to render campaign communications wholly non-probative of the motive to be sought. But I also suggest that any such definition would be difficult to derive and defend.

### A. *Apparent Motives*

If the basis for our examining government motives is expressivist in nature, then we should be interested in learning the publicly apparent reasons for the enactment of a law.<sup>73</sup> Those reasons may or may not align with the actual motivating factors that prompted governmental officials to act. But they remain relevant insofar as they help to shape the message that the law communicates to the political community writ large.

Campaign communications might help to illustrate publicly apparent motives in two different ways. First, and most obviously, candidates promote *policies* on the campaign trail, and in so doing, state *reasons* why they support those policies.<sup>74</sup> Where those same candidates win elections and thereupon act to enshrine those policies in law, reasonable observers will fairly attribute those officials' actions to whatever motivating reasons those officials cited on the campaign trail. If Candidate *A* promotes Policy *A* on the ground that it alone will produce Result *A*, an outside observer will (or at last may well) assume that Candidate *A*'s subsequent implementation of Policy *A* is motivated by a desire to produce Result *A*. The campaign itself will have created a public association between Policy *A* and desired Result *A* and that association will affect the reasonable observer's subsequent understanding of the Policy itself.

Second, and more broadly, candidates reveal to the world a set of *values*, *opinions*, and *worldviews* that may subsequently shape public perceptions of subsequent official actions. Democratic strategist David Axelrod has observed that campaigns are “like an MRI for the soul—whoever you are, eventually people find out.”<sup>75</sup> That may be overstating things a bit;

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<sup>73</sup> See Hellman, *supra* note 37, at 39 (noting that, within an expressivist framework, “[i]f objective meaning is determinative, evidence of subjective intent matters only so long as that evidence contributes to the public meaning of the action”); see also *id.* (“For example, private notes may be good direct evidence of subjective intent but are useless in determining what the law or policy expresses precisely because they are private.”).

<sup>74</sup> See, e.g., *Hillary's Vision for America*, OFF. HILLARY RODHAM CLINTON, <https://www.hillaryclinton.com/issues/> (last visited Sept. 10, 2018) (stating the reasons for a number of different policies from Hillary Clinton's 2016 presidential campaign).

<sup>75</sup> DAVID AXELROD, BELIEVER: MY FORTY YEARS IN POLITICS 462 (2015) (internal quotation marks omitted).

politicians, after all, can cultivate and maintain public personas that differ from their true personalities, at least in certain respects.<sup>76</sup> But whether or not it reflects a true representation of the candidate's inner soul, the belief structure projected on the campaign trail is one that will likely inform public perceptions of the candidate's subsequent actions. If, for instance, Candidate *A* reveals herself to harbor racial prejudices, then members of the public will be more likely to find a racially discriminatory intent lurking behind ostensibly race-neutral policies that the Candidate later comes to put in place. If Candidate *A* reveals herself to abhor a particular viewpoint or ideology, then members of the public will be more likely to find a viewpoint-discriminatory motive lurking behind a law that suppresses the expression of that ideology. This is all a simple reflection of the fact that (1) campaigns help to define the political identities of those who run for office and (2) those identities, once established, can inform public judgments about the values and beliefs that underlie official action.

Two features of campaign communications, moreover, may actually render them *especially probative* of a law's "social meaning." First, campaigns can be especially high-profile affairs; that is always true of presidential elections, but it often is true of statewide and local elections as well. The distinctive visibility of campaigns suggests that statements made during them may more often and more effectively penetrate public consciousness than statements made during the course of run-of-the-mill governmental operations. When laws get enacted and policies get implemented, members of the public may be more likely to view those laws and policies through the prism of the preceding political campaign rather than through the prism of legislative floor debates and administrative records. To be sure, the relationship is not one-to-one; some campaign communications fly below the radar, and some "official" communications seize public attention. Nonetheless, it will often be the case that a statement's status as a "campaign communication" may give us *more* rather than *less* reason to treat that statement as a valuable contributor to a law's expressive message.

Second, pre-election communications differ from post-election communications in the important sense that only the former constitute part of the public record against which voters make their decisions. That being so, some campaign communications of an especially high-profile nature might appear to receive the tacit assent of the polity if and when a candidate wins office. To the extent those communications connect up with a law that the winning candidate helps to put into place, the expressive harms generated by the law are amplified by the fact that the communications came before

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<sup>76</sup> See, e.g., DAN NIMMO & CHEVELLE NEWSOME, POLITICAL COMMENTATORS IN THE UNITED STATES IN THE 20TH CENTURY: A BIO-CRITICAL SOURCEBOOK 4–5 (1997) (describing the efforts of Edward L. Bernays to recast President Calvin Coolidge as a "warm, sympathetic human being").

rather than after constituents' votes were cast. Where public officials reveal bad motives after assuming office, observers can at least entertain the possibility that the bad motives reflect desires, values, and beliefs that most of their co-citizens would reject. But that inference becomes weaker where those same desires, values, and beliefs constituted part of the informational backdrop against which the political community voted. In this scenario, the bad motives are plausibly attributable not just to the candidate who made the motive-revealing communications, but also to the constituency that, having heard those communications, chose to elect the candidate in spite of (or, worse yet, because of) what the candidate said. From the perspective of the individuals who bear the brunt of the bad message, the expressive "sting" becomes all the more severe.

### *B. Actual Motives*

Unlike the message-based rationale for motives analysis, the effects-based and justification-based rationales call for an inquiry into motives that are actual rather than apparent. If a court knows what public officials actually want to achieve, then that same court becomes better positioned to evaluate both the positive and negative effects of their handiwork. Where, for instance, courts uncover a subjective desire to cause some sort of constitutionally salient harm, they may plausibly infer that the harm is especially likely to occur. And where courts uncover a disconnect between the motives underlying a law and the justifications said to support it, they may plausibly question the strength of the justifications themselves. Thus, from the perspective of both these rationales, we are interested in knowing what actually motivated government officials to do what they did.

In an ideal world, we could answer this question by entering the subjective consciousness of each official and recording what we find there. But this we cannot do. Instead, we must gather extrinsic evidence and deduce as best we can what we suspect to be going on in the official's mind. Past votes for past policies, for instance, may provide a clue as to why an official supports a present-day policy.<sup>77</sup> Political affiliations and group memberships may be similarly informative; if a politician's fellow travelers are known to support a policy for a particular reason, we might reasonably assume, at least as a default matter, that the politician herself supports the same policy for the same reason. But among the most useful such sources available to us will be the subject's own first-person reporting about what her own motives are. Where a public official has openly acknowledged the influence of a given motivating factor, the acknowledgment itself provides a

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<sup>77</sup> See, e.g., *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

basis for thinking that the motivating factor really did influence the official in the way that she herself described. To be sure, the subject might simply be lying or saying what she thinks her constituents want to hear. But if we are trying to divine official motive, the official's own statements about her own motives would at least seem to be a useful place to start. And indeed, within a variety of different contexts courts frequently consider a subject's own statements as indicative of what was going on in the subject's own head.<sup>78</sup>

The question then becomes whether campaign communications have anything useful to offer to this inquiry. Are campaign communications so much less reliable than other sorts of communications that we should categorically exclude them from our evidentiary inquiry? I see two potential grounds for making such a distinction, but neither strikes me as sufficiently persuasive to warrant a categorical, exclusionary approach.

First, we might claim that a candidate's statements about motive are unreliable because they lack a sufficient *temporal* connection to the legal actions we consider.<sup>79</sup> Candidates often launch their campaigns years before their eventually assuming office, and they will thus begin talking about what they're going to do well in advance of their actually doing it. That can create a time lag between a candidate's statements about policy and the actual implementation of policy—a time lag during which intervening events might alter a candidate's mental state. When a President speaks just prior to signing a bill (or a legislator speaks just prior to voting for that bill), we do not need to worry much about the possibility that the motive-revealing statements becoming an obsolete indicator of the bill's underlying purpose. But when the relevant statement comes from a long-ago campaign speech, we cannot be sure that the one-time-candidate still adheres to the beliefs and motivations that she expressed way back when she made her case to the voters.

It is probably true that statements about motive lose their probative value as they fade into the past. But a wholesale exclusionary approach to campaign communications would prove a clumsy means of confronting that reality. Some campaign communications may be roughly contemporaneous with government action. (Consider in particular the candidate running for re-election while continuing to conduct governmental business.) And some non-campaign communications may be uttered well before the relevant

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<sup>78</sup> See Fallon, *supra* note 5, at 580 (noting that “[t]he remarks of a single legislator in legislative debate may provide only weak evidence of the intentions or purposes of other members, but very strong evidence regarding the speaker’s intent”); see also *Arlington Heights*, 429 U.S. at 268 (noting that “contemporary statements by members of the decisionmaking body” can be “highly relevant” to a determination of discriminatory intent).

<sup>79</sup> I am not aware of this argument having been directly asserted in the case law. But it is perhaps alluded to in some judges’ stated fears that campaign-cognizant review might lead to the review of an official’s statements that were made “from a previous campaign, or from a previous business conference, or from college.” *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 650 (4th Cir.), *vacated in part*, 137 S. Ct. 2080 (2017).

government action takes place. (Consider an inauguration speech about legislation that takes several years to pass.) It may well be that campaign communications are more likely to present timeliness issues than are other indicators of government motive. But the connection is no means ironclad, and temporal distance is in any event easy to measure on its own terms. That being so, excluding all campaign statements from the evidentiary record would reflect both an over- and under-inclusive approach to dealing with to timeliness issues. The better approach would simply treat timeliness itself as a factor that bears on a statement's evidentiary weight.

Second, campaign communications might prove especially unreliable due to the competitive nature of campaigning. A candidate's goal is to win more votes than his opponent, and much of what that candidate says and does during the campaign will be in the sole service of that goal. Thus, when we consider what officials said during campaigns, we must acknowledge the complicated relationship between what those officials actually believed and what they believed the public wanted them to believe. Call this the "mere puffery" objection: Campaign communications reveal very little of significance about the true aims and intentions of the candidates who make them. The idea is captured in Judge Kozinski's recent observation that "[n]o shortage of dark purpose can be found by sifting through the daily promises of a drowning candidate, when in truth the poor shlub's only intention is to get elected."<sup>80</sup>

This is a stronger argument for excluding campaign statements from the evidentiary record, but it is not strong enough. To begin, the argument seems to prove too much. If we are concerned about pandering and puffery coming from candidates *for office*, we should also be concerned about pandering and puffery coming from officials *in office*—officials who still have incentives to get re-elected, acquire influence within the party, and curry favor with their constituents. Politicians certainly play politics before getting elected, but they continue to do so after getting elected. And that reality has not yet persuaded courts to treat all statements of government officials as categorically unreliable indicators of government motive. Consequently, if courts are willing and able to separate out the sincerity from the puffery when

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<sup>80</sup> *Washington v. Trump*, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting). Notice that the mere puffery objection is non-responsive to judicial efforts to discern objectively apparent motives, unless, that is, the politicians' statements are so disingenuous as to appear as such to the voters themselves. See Kitrosser, *supra* note 13 (noting that, from the perspective of an objective-intent inquiry, "[a] presidential action that is taken to appeal to a constituency's perceived bigotry is no less discriminatory in purpose than is an action that manifests the president's personal biases"); see also Huq, *supra* note 13, at 46 (noting that "it is passing odd to reject evidence on the ground that candidates should not be understood to mean what they say prior to an election: It might instead be more compatible with the democratic commitments of the Constitution to make precisely the opposite assumption as a way of taking seriously the electoral structures created in Articles I and II").

it comes to post-campaign statements by elected officials, they should be willing and able to do the same when it comes to statements that are made during campaigns.<sup>81</sup>

What is more, the puffery objection overlooks the role that campaign communications might have in *shaping* the subjective motives of public officials after the fact.<sup>82</sup> Consider, for instance, the making of campaign promises: If Candidate *A* repeatedly assures voters that she will take measures designed to marginalize a religious group, then Candidate *A*—through the very act of offering that assurance—has created a political need for herself to *deliver on the promise* once in office. In other words, even if Candidate *A* lacks a personal, subjective desire to discriminate on the basis of religion, Candidate *A* may well develop a subsequent, subjective desire to show her constituency that her campaigning amounted to more than just empty talk. The rhetoric may have been disingenuous at the moment it left a candidate's mouth, but once the rhetoric was uttered, it created a *reality* in which the candidate needed to follow through on it.<sup>83</sup> And, from the perspective of the results-based or justification-based rationale, that should be enough. A statement of this sort may not evince a “subjective motive” in the sense of revealing what a candidate truly, deeply believes in that candidate's heart of hearts. But it still reveals a *reason why* a candidate may desire to put a policy into place—a reason that can in turn reinforce constitutional concerns about both the policy's negative real-world effects and the pretextual nature of any justifications that the government has offered on the policy's behalf.<sup>84</sup>

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<sup>81</sup> Cf. Fields, *supra* note 13, at 300–01 (noting that the puffery objection “articulates a concern that is a matter of degrees rather than absolutes, of evidentiary weight rather than admissibility”).

<sup>82</sup> See Hasen, *supra* note 13 (noting that “[c]andidates tend to keep their promises,” and that “[i]f voters can rely on discriminatory statements in deciding who to vote for, so should those who later challenge the discrimination that flows after the season of campaign promises”). See generally JEFF FISHEL, PRESIDENTS & PROMISES: FROM CAMPAIGN PLEDGE TO PRESIDENTIAL PERFORMANCE (1985) (providing evidence, based on a close study of presidential campaigns from 1960 through 1980, that presidential candidates strive to keep their campaign-related promises).

<sup>83</sup> To take a recent example, Paul Ryan recently cited Republicans' repeated promise to “repeal and replace” the Affordable Care Act as a reason for their ongoing efforts to do the same after the election. See Paul Ryan, *Keeping Our Promise to Repeal ObamaCare*, WALL ST. J. OP. (Mar. 22 2017, 6:39 PM), <https://www.wsj.com/articles/keeping-our-promise-to-repeal-obamacare-1490222397>. Ryan himself may well have had his own personal reasons for supporting the repeal, but other members of Congress likely supported the repeal precisely because of their prior promise to pursue it.

<sup>84</sup> See Clarke, *supra* note 13, at 48.

*C. Other Motives*

On the rules-based rationale for motives analysis, bad motives matter because they violate some “rule” or “principle” that binds a reviewing court. That rule/principle might derive from considerations of constitutional text, history, or structure, or from a more philosophically-oriented account of the values underlying the relevant constitutional provision. But regardless of the source or content of the rule being applied, the critical, shared feature of these arguments is their ability to justify the invalidation of badly-motivated action by reference to the rule standing on its own. A motive counts as bad simply because the rule says it is bad.

On a rule-based approach to motive analysis, the probative value of campaign communications will depend on the particular rule being applied. If, for instance, a rule directs attention to the objectively apparent motives underlying government action, then—for reasons we have already identified—campaign communications should carry some evidentiary value. The same point holds for the application of rules that call for an inquiry into the actual, subjective motives underlying government action: Here too, as we have already suggested, campaign communications can usefully inform the motive-based inquiry. But a governing rule might also define the disfavored motive in more contingent or particularized terms, in which case campaign communications may not have an evidentiary role to play.

I cannot rule out this possibility: It is possible as a conceptual matter to formulate a rule that defines proscribed motives in a manner that renders campaign communications irrelevant to the inquiry. Consider, for example, a rule that declares: “The Equal Protection Clause requires courts to strictly scrutinize legislation motivated by a racially discriminatory intent, but only insofar as that intent is manifested in formal legislative proceedings.” I am not aware of any existing doctrinal rules that work this way, but perhaps such a rule would follow from some as-yet undiscovered nugget of constitutional history, some as-yet unnoticed pattern within the constitutional text, some as-yet unembraced philosophical insight regarding the wrongfulness of discriminatory action, or some other development we cannot now foresee. And if it did, there would arise along with it ipso facto reason for ignoring campaign communications while assessing government motive.

Having said that, I do want to consider one potential “rule-based” argument that might have the effect of rendering campaign communications irrelevant to a wide range of motive-based inquiries. The argument—which surfaced at points during the travel ban litigation<sup>85</sup>—would go something like

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<sup>85</sup> Brief for Appellants at 50, *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. Mar. 24, 2017) (No. 17-1351) (“The problem with campaign statements is not that they may be forgotten,

this: The Constitution, concerned as it is with *state* action, has nothing to say about what governmental officials may or may not do in their unofficial capacities.<sup>86</sup> Thus, the argument goes, insofar as courts screen for badly-motivated action, this basic structural feature of constitutional law requires that the inquiry extend no further than the “*official* motives” of government actors. The argument would thus posit a key distinction between official and unofficial conduct, and it would derive from that distinction the rule that only “officially” proclaimed motives should bear on a law’s constitutionality. Given that public officials make campaign statements in their unofficial capacity, such statements would, by definition, fail to shed light on the government’s official reasons for acting.<sup>87</sup>

The trouble with this argument lies not in the structural principle it posits—certainly, one can contend that the Constitution applies to only the “official” actions of governmental agents and entities. Rather, the trouble lies in its conflation of substantive postulates about what the Constitution prohibits with evidentiary postulates about how prohibited conduct may be shown. The “state action” principle gives us good reason to reject constitutional challenges predicated on actions that candidates took with respect to their own “unofficial” campaigns. (Troubling as it may have been for Donald Trump to exclude certain media outlets from his campaign rallies,<sup>88</sup> the state-action requirement would likely defeat any claim that the

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but that they do not prove anything about the official objective underlying subsequent action.”); *see also* Kontorovich, *supra* note 13 (“More broadly, constitutional structure supports examining only executive statements to interpret executive action. When Trump made his most controversial statements, he was [a] private citizen. He had not sworn to uphold the Constitution, or to take care that the laws be faithfully executed. He was, in this sense, a legally differently obligated person.”). The Court itself has used the phrase “official objective,” but in context, its use of the term seems to align more closely with the idea of an authoritative finding of motive rather than a motive that derives from official government proclamations. *See* *McCreary Cty. v. ACLU*, 545 U.S. 844, 862–63 (2005).

<sup>86</sup> The notable exception, of course, is the Thirteenth Amendment.

<sup>87</sup> A related argument, advanced in the context of the travel-ban litigation, holds that the Oath of Office, combined with the Article II duty to “take care that the laws be faithfully executed,” renders pre-inauguration statements inherently irrelevant to the motives underlying post-inauguration actions. *See, e.g.*, Kontorovich, *supra* note 13. But this argument would seem to prove too much: if the Oath and take-care duty were as transformative as the argument posits them to be, then courts would have no reason to question the legality of anything an oath-taking President does. But, of course, courts routinely entertain the possibility that a President might *violate* the Oath by acting unlawfully; and if that is the relevant question, there is no immediately apparent reason why the Oath itself requires confining the evidentiary record to statements made after the Oath’s administration. It seems strange to concede, on the one hand, that the Oath does not guarantee the lawfulness of all presidential action, while insisting at the same time that the oath wipes away all the bad motives that a new President might have harbored in the not-too-distant past.

<sup>88</sup> *See* Hadas Gold, *Trump Campaign Ends Media Blacklist*, POLITICO (Sept. 7, 2016, 10:01 AM), <http://www.politico.com/blogs/on-media/2016/09/trump-campaign-ends-media-blacklist-227827> (noting that “[t]he blacklist ha[d] been in effect at the Trump campaign for nearly a year”).



exclusion violated the First Amendment.<sup>89</sup>) But it hardly follows that, once the state has acted, courts must ignore unofficial statements when investigating the reasons why the official action itself occurred. Just because I am acting in my unofficial capacity does not mean that I am unable to propose, describe, explain, and/or justify things I plan to do in my official capacity; indeed, candidates for public office spend much of their time doing just that. And when I subsequently do the things I previously described, my earlier (unofficial) statements remain relevant to the question of why I chose to do what I (officially) did. Citing to “unofficial” statements in this sort of way is no more controversial from a state-action perspective than, say, citing to an “unofficial” academic study for purposes of bolstering a conclusion about a law’s regulatory effects, citing to “unofficial” testimony for purposes of illustrating the existence of a regulatory need, or even citing to an “unofficial” law review article for purposes of supporting a legal claim of relevance to a case under review. Just because the evidence itself comes from an “unofficial” source in no way undermines its ability to shed light on the legality of what was officially done.

### III. THE CONSEQUENCES OF INCLUSION

Even if campaign communications have evidentiary value, courts might still worry about the regulatory consequences of the inclusionary approach. The law of evidence is replete with rules that require the exclusion of potentially probative information, and many of these rules are justified by reference to concerns about the regulatory effects of letting that information in. Various common law “privileges” make sense along these lines—a client’s communication with her attorney may be decisively probative of a key factual question, but revealing that communication to a jury would undermine the relationship of trust between attorneys and clients.<sup>90</sup> Public law rules of “executive privilege” have been justified along similar lines.<sup>91</sup> And, of course, the Fourth Amendment’s exclusionary rule is often defended as necessary as to achieve the consequence of deterring unlawful government

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<sup>89</sup> See Colleen Shalby, *Has Trump Violated the 1st Amendment? Not Yet*, L.A. TIMES (July 14, 2016, 7:00 AM), <http://www.latimes.com/politics/la-na-pol-trump-reporter-ban-first-amendment-20160714-snap-htmlstory.html> (quoting Prof. Michael Shapiro as noting that “[c]andidates are not subject to the 1st Amendment even though their candidacies are part of the fabric of government” (internal quotation marks omitted)).

<sup>90</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (noting that “the purpose of [attorney-client] privilege” is “to encourage clients to make full disclosure to their attorneys” (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976))).

<sup>91</sup> See *United States v. Nixon*, 418 U.S. 683, 705 (1974) (“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”).

behavior, even where the excluded evidence might help to demonstrate that a defendant committed a crime.<sup>92</sup>

A similar argument might justify the exclusion of campaign communications from motive-related inquiries. In this Part, I consider three types of consequences about which opponents of the inclusionary approach might worry. First are *campaign-related* consequences; more specifically, the inclusionary approach might function to “chill” candidates’ communications on the campaign trail. Second are *governing-related* consequences; more specifically, the inclusionary approach might render valuable policies vulnerable to invalidation on motive-related grounds. Finally, there are *court-related* consequences; more specifically, the inclusionary approach might give judges too much room to engage in manipulative and unpredictable decision-making.

#### A. *Effects on Campaigning*

Let’s begin with the most straightforward consequentialist objection to the use of campaign communications as evidence of bad motives. If candidates’ statements can affect the constitutionality of their subsequent actions, then candidates will become more cautious about what they say when they campaign. Rather than openly broadcast controversial policies and ideas, candidates will simply hide the ball—disingenuously pretending to support policies for reasons that they don’t actually believe, or not saying anything about those policies at all. The result is a less robust political dialogue and deprived information base for voters to consult when making their electoral choices. Indeed, such chilling effects may even carry the undesirable result of rendering voters’ democratic choices less responsive to the *true* aims and intentions of candidates for public office.<sup>93</sup>

An initial difficulty with this argument lies in its prediction that campaign-cognizant motives analysis would in fact have a substantial effect on what is said and done on the campaign trail. At the margin, perhaps, a candidate who is otherwise indifferent to the prospect of broadcasting bad motives may regard hypothetical litigation difficulties as a decisive reason to keep those motives bottled up. But a candidate’s top priority is usually to win

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<sup>92</sup> See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (characterizing the exclusionary rule as “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect”).

<sup>93</sup> For general versions of this critique, see, for example, *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995) (declining to consider an elected prosecutor’s previous campaign statements on the ground that doing so would “chill political debate during campaigns for prosecutor”). See also *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 650 (4th Cir. 2017) (Neimeyer, J., dissenting); *Washington v. Trump*, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting); Kontorovich, *supra* note 13.

the election,<sup>94</sup> and that present-day imperative will typically take precedence over the highly secondary priority of avoiding future complications in court.<sup>95</sup> This seems especially true with respect to candidates for the legislature and other multi-member institutions, who might regard their own statements as unlikely to be decisive in a court's assessment of the institution's own reasons for acting. If a candidate sees political value in making some statement, then the down-the-road prospect of litigation difficulties is unlikely to make the candidate change course.<sup>96</sup> Rather, the candidate will opt for the immediate electoral gain and figure out sometime later how to deal with eventual constitutional difficulties if and when they arise. This is, to be clear, just a supposition, and perhaps empirical data would prove it wrong. But my intuition is that the openness and robustness of political campaigns will not much change if courts were to openly adopt the inclusionary approach.

But suppose that I am wrong and that an inclusionary approach would in fact meaningfully deter political candidates from saying things that might one day be used to support an inference of improper motives. Does that fact alone provide a sufficient reason to reject it? Certainly, the chilling effects argument is correct to posit a "cost" in the way of First Amendment free-speech values;<sup>97</sup> if the only relevant goal is to foster a truly unfettered, no-holds-barred political campaign, then any deterrent on campaign-related communications would provide definitive cause for concern. But the Free Speech Clause does not exhaust the entire range of constitutional values at play, and tradeoffs start to come into view when these other values are

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<sup>94</sup> The "chilling effects" objection in this sense stands in some tension with the "mere puffery" argument we earlier considered. See *supra* Section II.B. That argument, recall, posited that campaign communications are useless indicators of future government action, reflecting instead meaningless efforts at pandering. But if such motive-revealing statements constitute meaningless puffery, the First Amendment case for preserving those statements becomes correspondingly less strong.

<sup>95</sup> The degree of the candidate's relative apathy towards future litigation may be amplified by the well-documented behavioral tendency to discount future costs. See, e.g., David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315, 1324–27 (2003) (noting that "[a] substantial experimental literature suggests that people value the avoidance of immediate or nearly immediate losses far more strongly than the avoidance of losses even in the not-too-distant future").

<sup>96</sup> See Clarke, *supra* note 13, at 69 (noting that politicians who "rise to prominence by eschewing 'political correctness' and making overtly racist and sexist campaign promises" are "unlikely to be deterred by the prospect of litigation").

<sup>97</sup> To be clear, in raising this possibility, I do not mean to suggest that campaign-cognizant motives review might *violate* the First Amendment itself. That possibility strikes me as unlikely, given the absence of any sort of "official sanction" or "punishment" that the inclusionary approach entails. See Kitrosser, *supra* note 13 (noting that "[w]eighing such [campaign] statements as evidence . . . is not the same thing as punishing candidates for the statements themselves"); see also Michael Coenen, *Of Speech and Sanctions: Towards a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 994, 1018–19 (2012) (considering the relationship between penalty severity and the scope of the free speech right). But even if First Amendment doctrine *permits* the inclusionary approach, we can still consider the question whether First Amendment *values* might militate against judicial reliance on that approach.

considered. The relevant question, after all, is not whether a reduction in political candidates' expressive freedom represents a free speech-related cost; rather, it is whether those costs are significant enough to outweigh whatever constitutional benefits that the inclusionary approach would confer.

Consider, for instance, the possibility that a candidate, fearing future constitutional troubles, declines to defend a policy proposal by reference to a harmful racial stereotype. From a purely "free speech"-focused perspective, the candidate's self-censorship represents a constitutional "loss": the candidate would have expressed himself more freely but for the courts' willingness to consider campaign communications as evidence of improper motive. But from an equal protection perspective, the candidate's self-censorship represents a plausible constitutional "gain." The candidate has declined to validate a set of constitutionally-suspect motives and beliefs and, thus by extension, has helped to minimize future public suspicions that those motives and beliefs are impermissibly influencing official government policy.<sup>98</sup> Or consider, conversely, the possibility that a candidate, knowing full well that courts must ignore what he says while campaigning, openly espouses racist views and openly assures his supporters that he will, if elected, promote the ideology of white supremacy. And suppose the candidate thereupon assumes office and begins implementing facially-neutral policies with racially discriminatory effects. The campaign statements make it abundantly clear that the official is pursuing an intentionally discriminatory goal, but the strict evidentiary prohibition renders courts powerless to acknowledge that reality. Here too, free-speech values and equal-protection values collide: The "benefit" of a robust and freewheeling campaign comes at the expense of racially discriminatory action that courts can do nothing about.

How one reconciles these tradeoffs depends on the relative weights one places on free-speech values and the competing, constitutional values that motive-based requirements can bring into play. Perhaps, as a matter of first principles, free-speech values are so much more important and so much more absolute that they must always take precedence across all doctrinal contexts.<sup>99</sup> I cannot definitively refute that argument here,<sup>100</sup> but there is an

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<sup>98</sup> See *Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 600 ("To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a welcome restraint.").

<sup>99</sup> Even here, complications would arise insofar as a challenger pointed to campaign-communications to support a First Amendment claim, at which point, one set of free-speech values (say, the value of free, unfettered debate) would be pitted directly against another (say, the value of avoiding governmental action that appears to punish the espousal of unpopular beliefs).

<sup>100</sup> For a more extended exploration into the means by which courts might attempt to gauge the relative "importance" of legal rights (including, but not limited to constitutional rights), see Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 732-34 (2013).

important sense in which it ends up proving too much. Motive-based rules—even with campaign communications fully excluded from judicial purview—will always produce caution and self-censorship on the part of individuals holding office.<sup>101</sup> The “discriminatory intent” requirement of the Equal Protection Clause may affect what a governor says at a bill-signing ceremony; the motive-based elements of dormant Commerce Clause may affect what a state legislator says in a press release; the “purpose” prong of the *Lemon* test may affect what an administrator says in a television interview; and so forth. Again, from one perspective, this result might seem like a good thing: motive-revealing rhetoric of this sort can be characterized as constitutionally bad and its minimization as constitutionally good. But whether the result is good or bad, my point here is simply that the result obtains. As long as motives matter in constitutional law, public officials will have reason to avoid injecting certain types of arguments and justifications into public debate. The chilling effects don’t just melt away when the campaign ends.<sup>102</sup> Consequently, if free-speech concerns turn out to be powerful enough to require an exclusionary approach to communications made during a campaign, they would also seem to require an exclusionary approach to any motive-revealing communications made at any time in any form. As long as motives matter, aspiring and actual public officials will sometimes have to moderate what they say.

### B. *Effects on Governing*

A second objection to the inclusionary approach would point to consequences arising after the campaign has concluded. If government officials have broadcast bad motives when campaigning for office, the inclusionary approach might sometimes help to demonstrate that suspect motives lurk beneath those officials’ subsequent actions. And in so doing, the approach will increase the likelihood of those subsequent actions being struck down. Where deferential review would normally apply, searching judicial review will instead apply—all because of what a public official said back when that official was running for office. This would amount to, in some judges’

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<sup>101</sup> See Somin, *supra* note 13 (“Any inquiry into the discriminatory motives of government officials might potentially chill their speech, because speech indicating a discriminatory motivation is inevitably going to be relevant evidence in such a case.”).

<sup>102</sup> Indeed, a former candidate would now have even less reason to discount the risk of subsequent judicial invalidation. The post-campaign risk of constitutional trouble would be higher because: (a) post-campaign statements will have a closer temporal proximity to the official governmental action; and (b) the candidate would now actually hold the office rather than simply have a chance of doing so. In other words, what once was the risk that something said might eventually cause constitutional trouble in the event that the candidate won election would now become the (higher) risk that something said might more immediately cause constitutional trouble, period.

views, “an absurd result—namely, that the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate.”<sup>103</sup> Call this the “constrained governance” concern; it stems from worries that a former candidate will have a hard time implementing government policy if courts can pay attention to what that candidate said in the past.

There are two ways of interpreting the “constrained governance” complaint. First, the complaint may simply state an equitable concern about the unfairness of “punishing” a former candidate for things that were said during a campaign. If this is the relevant concern, then color me unsympathetic. Campaign-cognizant motives analysis may well create a problem for former political candidates who now assume the burden of governing. But if an official himself really did signal bad motives during the course of a campaign, the problem is one of the official’s own making. To take the most obvious example, no one forced Donald Trump to demonize the world’s second-largest religious group when he sought the Presidency. Instead, Trump himself chose to make anti-Muslim sentiment a pillar of his campaign, calculating—quite possibly correctly—that doing so would redound to his political benefit. But whatever the political expedience of this maneuver, it had the foreseeable consequence of casting now-President Trump’s immigration policy in a troubling constitutional light. Pitying Trump and blaming the courts for that state of affairs seems to me to get things backwards. Trump was the one that repeatedly defended his immigration priorities in religion-charged terms, and the courts were the ones who had to grapple with the constitutional difficulties that his own rhetoric created.

But even if we set aside concerns about the fair treatment of candidate-speakers, there is a separate version of the “constrained governance” complaint that we need to consider. The concern here is that judicial scrutiny of campaign communications will sometimes result in the invalidation of laws that—from a purely consequentialist standpoint—really ought to be in place. For example, counterterrorism needs may sometimes necessitate the adoption of rules that have a disparate impact on some Muslim-majority countries. But if the President’s own campaign communications support an inference of anti-Muslim animus, then those

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<sup>103</sup> *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting); see also *Int’l Refugee Assistance Project v. Trump*, 857 F.3d at 650–51 (Niemeyer, J., dissenting) (worrying that an inclusionary approach would “leave the President and his Administration in a clearly untenable position for future action” given that “President Trump will need to engage in foreign policy regarding majority-Muslim nations, including those designated by the Order”); Kontorovich, *supra* note 13 (“This would mean that Trump is automatically disbarred, from the moment of his inauguration, of exercising certain presidential powers, not because of his actions as president, but because of who he is—that is, how he won the presidency.”).

same policies will always be vulnerable to judicial invalidation, even where those policies have valid, security-promoting effects. And one can imagine other variations on the theme. A candidate's past appeal to racial stereotypes might frustrate a state's present-day ability to foster valuable student diversity at its educational institutions.<sup>104</sup> A candidate's past embrace of the goal of impeding access to abortions might frustrate a state's ability to implement valid health and safety measures related to the licensing of abortion providers.<sup>105</sup> A candidate's expressed desire to silence an opposing viewpoint might frustrate the state's ability to implement any number of sensible "time, place, manner" restrictions on speech.<sup>106</sup> In short, the inclusionary approach could end up prohibiting former candidates from pursuing a variety of legitimate or even compelling regulatory ends.

This objection states a valid concern, but the concern is over- and underinclusive in relation to the conclusion it prescribes. As to the problem of underinclusiveness, the "constrained governance" objection, like the "chilling effects" objection, implicates *all forms* of government-motives analysis, not just campaign-cognizant motives analysis in particular. Any area of doctrine that calls for a consideration of government motives gives rise to the possibility that certain statements or actions by government officials will render their policies vulnerable to judicial invalidation; that possibility becomes no less acute when the relevant statements and actions postdate an official's elevation to office. Indeed, taken to its logical extreme, the "constrained governance" objection simply collapses into a prescription for majoritarian judicial review.<sup>107</sup> That prescription may or may not have

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<sup>104</sup> Of course, a race-conscious admissions program would already trigger strict scrutiny, so the motive-revealing statements would have no effect on the level of scrutiny being applied. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003) (applying strict scrutiny to a race-conscious admissions program). Even so, the revealed motives and/or beliefs might prompt a court to look more skeptically at the government's justification for the program when applying the strict scrutiny standard. *See supra* Section I.C.

<sup>105</sup> Here, campaign communications might be used to show that the restriction served the "purpose" of creating a "substantial obstacle" to pre-viability abortions, even if it did not necessarily achieve that purpose in effect. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) ("An undue burden exists, and therefore a provision of law is invalid, if its purpose *or* effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." (emphasis added)).

<sup>106</sup> The campaign communication in this example might suffice to demonstrate that the speech-infringing aspects of a law were in fact "related to the suppression of free expression," in which case a "more demanding standard" of scrutiny would apply. *Texas v. Johnson*, 491 U.S. 397, 403–04 (1989); *see also* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting that, "in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular," the "government's purpose is the controlling consideration").

<sup>107</sup> After all, and as I have suggested elsewhere, many constitutional constraints on government will have the effect of making it more difficult for governments to govern. That is just a baseline feature of a system that involves judicially enforceable constitutional limits. *See* Coenen, *supra* note 59, at 53–56.

merit, but it ought at least be stated as such.

As to overinclusiveness, the “constrained governance” objection posits an unpersuasive case for a *total* abandonment of the field. The objection may suffice to show why courts should never treat the badly-motivated nature of a law as a ground for automatic invalidation. But it states a less persuasive case against merely raising the justificatory hurdle that badly-motivated actions must clear. One can apply a strong judicial presumption against badly-motivated action while still permitting the government to act in the face of a sufficiently strong regulatory need. That, indeed, is what many existing areas of doctrine purport to do,<sup>108</sup> and it reflects one attempt to reconcile the real constitutional problems that bad motives create with the real-world demands that government actors must face. The point, to be clear, is not that existing doctrine strikes precisely the right balance between these competing concerns, or even that striking the right balance is conceptually easy to do.<sup>109</sup> Rather, the point is simply that the balance can at least be attempted: One does not need to “choose” between the polar extremes of caring exclusively about bad motives, on the one hand, and of deferring reflexively to the government, on the other. Intermediate solutions can and do exist.

What is more, even if an existing form of motive analysis might prevent the government from pursuing what it regards to be necessary regulatory action, the government can itself alter the backdrop against which this analysis proceeds. This is especially true where the relevant motives are *apparent* rather than *actual*. Social perceptions are fluid and malleable, and if the government wishes to “change the narrative” about a given law or policy, it certainly has the wherewithal to do so. Some critics of the inclusionary approach have insisted that candidates who broadcast bad motives on the campaign will forever be “stuck” with those same bad motives going forward.<sup>110</sup> But why should that be so? There is nothing external to the President that prevents him from disavowing his previous “Muslim ban” and expressing regret at having previously appealed to anti-Islamic prejudices. And if such an about-face proves to be sufficiently public, enduring, and sincere, then the “social meaning” of the President’s immigration policy can in fact change and, along with it, the constitutional implications of the policy

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<sup>108</sup> See Fallon, *supra* note 67, at 1309–11 (explaining how some policies have survived strict scrutiny).

<sup>109</sup> For example, Ashutosh Bhagwat has criticized the strict scrutiny test on the ground that its relatively “ad hoc” nature has “tended to weaken individual rights.” Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 962 (1998).

<sup>110</sup> See, e.g., *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting) (“If a court were to find that campaign skeletons prevented an official from pursuing otherwise constitutional policies, what could he do to cure the defect? Could he stand up and recant it all (‘just kidding!’) and try again?”).



itself.<sup>111</sup>

All of this may seem far-fetched,<sup>112</sup> but I believe its underlying constitutional logic is sound. Whenever constitutional law draws a distinction between badly-motivated and innocently-motivated government action, courts must make some inquiry into the reasons for which the government acted. Those reasons can be evinced by a variety of different materials, including, but not limited to, statements that government officials issued while running for office. But just as campaign communications can showcase bad motives, so too can post-campaign communications showcase innocent motives. And the latter statements, if weighty enough, should alter the motive-based calculus, by revealing that government officials appear to endorse—or in fact do endorse—policies for reasons that are different from ones that they embraced during the campaign. That the structure of this inquiry might sometimes *induce* government officials to “change their tune” strikes me as a feature rather than a bug of motive-sensitive doctrinal analysis. If we care about government motives (and especially about apparent government motives), rules that encourage officials openly to abandon wrongful purposes create exactly the set of incentives that the doctrine ought to strive for.

### C. *Effects on Judging*

A final, consequence-based objection to campaign-cognizant motives review points to disruptive effects within judicial doctrine itself. The inclusionary approach, by definition, widens the evidentiary domain within which motives analysis proceeds. The higher the number of statements and communications that courts can consider, the more unbounded the inquiry becomes. That open-endedness, in turn, can render legal conclusions about motive more difficult to predict and easier to manipulate in the service of extralegal goals. Viewed from this perspective, a bright-line, exclusionary approach to campaign communications may be seen as a welcome means of circumscribing a form of judicial analysis that might otherwise spin out of control.

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<sup>111</sup> Cf. Joseph Blocher, *Out, Damned Spot: What Cure for Unconstitutional Animus?*, TAKE CARE (May 31, 2017), <https://takecareblog.com/blog/out-damned-spot-what-cure-for-unconstitutional-animus> (considering the problem of how courts might determine whether government statements suffice to “remove the taint” of an impermissible purpose, and suggesting that while “[i]t is not easy to articulate a single, trans-substantive test for curing unconstitutional intent. . . . [D]escribing a cure is not radically different from that of diagnosis, which the Court has done in a variety of contexts”); see also Coenen, *supra* note 5, at 1769 (noting that “the potential for fruitful dialogue [is] driven by motive-based rules”).

<sup>112</sup> I concede that it is far-fetched to imagine President Trump disavowing his previous statements about Islam, but that is an altogether separate issue.

In endorsing an exclusionary approach, one lower court judge recently gave voice to this very concern:

[C]ampaign statements are unbounded resources by which to find intent of various kinds. They are often short-hand for larger ideas; they are explained, modified, retracted, and amplified as they are repeated and as new circumstances and arguments arise. And they are often ambiguous. A court applying the majority's new rule could thus have free rei[n] to select whichever expression of a candidate's developing ideas best supports its desired conclusion.<sup>113</sup>

The concern, moreover, goes beyond the problem of doctrinal uncertainty. Left free to rummage through campaign materials, the argument goes, judges will start to develop even bolder ideas: "If a court, dredging through the myriad remarks of a campaign, fails to find material to produce the desired outcome, what stops it from probing deeper to find statements from a previous campaign, or from a previous business conference, or from college?"<sup>114</sup> The exclusionary approach, so the argument goes, would stop such shenanigans dead in their tracks.<sup>115</sup>

Like any objection grounded in concerns about open-endedness and unpredictability, this argument implicates the familiar "rules/standards" tradeoff. All else equal, the exclusionary approach (which regards campaign communications as categorically irrelevant) prescribes a form of motives analysis that is more rule-like than the inclusionary approach (which regards campaign communications as potentially relevant).<sup>116</sup> The former, unlike the latter, places a large body of potentially probative evidence out of bounds, thus obviating the need to make difficult judgment calls about the meaning of certain statements, their connection to a challenged law, the comparative weight to accord them, and so forth. But, as is often true with bright-line rules, the gains in simplicity and straightforwardness come at the expense of

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<sup>113</sup> *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 650 (4th Cir. 2017) (Niemeyer, J., dissenting).

<sup>114</sup> *Id.*; see also *Washington v. Trump*, 858 F.3d at 1173 (Kozinski, J., dissenting) ("And why stop with the campaign? Personal histories, public and private, can become a scavenger hunt for statements that a clever lawyer can characterize as proof of a -phobia or an -ism, with the prefix depending on the constitutional challenge of the day.").

<sup>115</sup> See *Washington v. Trump*, 858 F.3d at 1174 (Kozinski, J., dissenting) ("Limiting the evidentiary universe to activities undertaken while crafting an official policy makes for a manageable, sensible inquiry. But the panel has approved open season on anything a politician or his staff may have said, so long as a lawyer can argue with a straight face that it signals an unsavory motive.").

<sup>116</sup> It is perhaps worth noting that the inclusionary approach may in some cases simplify the judicial inquiry. Suppose, in particular, that the relevant "official" proclamations, statements, etc., are ambiguous as to the existence of a suspect motive, and suppose further that the relevant campaign-related communications are relentlessly and unambiguously revealing of that suspect motive. In this scenario, the exclusionary approach leaves judges charged with the difficult task of parsing and interpreting the ambiguous official statements, whereas the inclusionary approach makes it easy for judges to resolve the ambiguities. Sometimes, in other words, broadening the evidentiary pool will have the beneficial effect of generating clarity where confusion would otherwise have prevailed.

accuracy, nuance, and context-sensitivity.<sup>117</sup> And that is so because, as I have already argued, campaign communications can sometimes provide useful, relevant information about the government's reasons for acting. How one responds to this tradeoff depends in part on one's relative affinities towards rules and standards. But in my view, the simplicity-related benefits of the exclusionary approach are not significant enough to justify its accuracy-related costs.

Three observations might bolster this conclusion, even for those who place a higher premium on the value of bright-line rules. First, under some circumstances, the inclusionary approach will actually prove more clarity-enhancing than its exclusionary counterpart. Where the record reveals little information (or mixed information) about post-election government motives, the exclusionary approach will present a difficult, motive-related inquiry. But where pre-election communications make the motive abundantly clear, the inclusionary approach will greatly simplify the inquiry. An expanded universe of relevant evidence, in other words, does not always yield a more complex and indeterminate evidentiary inquiry. Where the evidentiary universe is expanded to encompass highly probative information, what was once a difficult and unbounded investigation into government motive will become simple and straightforward instead.

Second, and relatedly, an exclusionary approach to campaign communications may not provide as much of a bright-line sorting mechanism as first meets the eye. Under some circumstances, the distinction between "campaign-related" and "campaign-unrelated" communications may turn out to be straightforward, but in other circumstances, one can imagine various threshold difficulties raised by the distinction itself. This seems especially so with respect to incumbents running for re-election—officials, that is, who are simultaneously campaigning and governing during the same time period. When it comes to these officials, what sorts of statements should the exclusionary approach exclude? Certainly statements made at campaign rallies and fundraisers. But what about statements made at a press conference before the rally? Statements uttered during a cable news interview? Statements posted to the individual's unofficial (and/or official) Twitter feed? Statements made at "official" events that had an evident, campaign-related purpose? Given the frequent blending of governing and politicking, incumbents' actions will sometimes be difficult to place on one side or the other of the "campaign-related" line. Under an inclusionary approach, however, this particular difficulty goes away; the absence of a threshold bar on campaign-communications obviates the need to tag such communications as campaign-related or campaign-unrelated in the first place.

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<sup>117</sup> See Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 644, 652 n.19 (2014).

Finally, the simplicity-based critique of the inclusionary approach likely understates the potential for subsequent clarifying guidance. Open-standards can be “rulified” over time,<sup>118</sup> and it is easy to imagine the emergence of various rule-like restrictions on the *application* of campaign-cognizant motives review. For example, the doctrine might prohibit reliance on statements by surrogates, thus restricting the evidentiary domain to only those words that were uttered by candidates themselves. The doctrine might impose *temporal* restrictions on the use of campaign communications, permitting reliance, for instance, on only those statements and communications that were uttered during the candidate’s most recent run for office. The doctrine might develop a more nuanced set of rules regarding the *strength of the connection* between motive-revealing communications and the policies that they might inform—requiring, for instance, that an actual government policy constitute a “direct outgrowth” of a campaign proposal that was defended in constitutionally suspect terms.<sup>119</sup> I raise these possibilities not for the purpose of endorsing them; some may be undesirable on their own terms and others may not provide much in the way of constraining “rulification.” But they at least serve to highlight the possibility of citing to campaign communications within a framework that is at least somewhat structured and constraining.

One final point bears mentioning here, as applied to the particular concern about judicial manipulation and abuse. At the margins, it may be true that the inclusionary approach gives judges more leeway to manipulate doctrine than does its exclusionary counterpart. But I doubt the difference is great. Judging governmental purpose is an inherently discretionary endeavor, requiring difficult (and to some extent ineffable) judgments involving abstractions like “intentions,” “mental states,” “social meanings,” and so forth.<sup>120</sup> The abstractness of the concepts themselves will always create room for opportunistic and manipulative judging; that risk, I think, is simply baked in to the business of considering government motives in the first place. Motive-based rules are in this sense no different from any number of other rules within constitutional law that create openings for bad-faith

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<sup>118</sup> See *id.* at 653–58; see also Mark D. Rosen, *Modeling Constitutional Doctrine*, 49 ST. LOUIS U. L.J. 691, 696 (2005) (noting that open-ended standards “almost always become[] increasingly rule-like” as they are applied over time).

<sup>119</sup> Cf. Somin, *supra* note 13 (emphasizing that President Trump’s travel plan was a “direct outgrowth of a major theme” of his campaign).

<sup>120</sup> And that is to say nothing of any number of other tasks that judges routinely take on, such as defining the relevant “field” that a law regulates for purposes of preemption analysis, asking whether a particular government interest qualifies as “compelling” for purposes of applying strict scrutiny, or consulting historical sources (including, not incidentally, the campaign-centered Federalist Papers) in an effort to discern the “original public meaning” of the Constitution’s text. See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1288 (2006) (“No one doubts . . . that constitutional law makes frequent use of standards, often without anguish concerning their judicial manageability.”).

mischief-making by the judges who apply them. They are there, and they can be abused. But if we are willing to tolerate that risk when it comes to evaluating government motives in the first place, then it seems to me that we should be equally willing to tolerate the risk when it comes to defining the evidentiary parameters of the inquiry. In both cases, the better guard against abusive judicial conduct lies in the maintenance of professional standards that promote honesty, impartiality, and good-faith behavior within the judiciary itself—not in constructing largely arbitrary prophylactic rules governing the sorts of evidence on which judges can and cannot rely.

### CONCLUSION

The appeal of the exclusionary approach may stem from the commonly shared idea that judging is—or at least ought to be—an apolitical exercise. If we are serious about maintaining a wall between law and politics, the argument goes, then we should eschew the inclusionary approach on the ground that, by intermingling electoral politics with constitutional law, it threatens to breach the divide. But it is also worth remembering that *too much* separation between law and politics may itself be a bad thing, threatening to render the doctrine unduly artificial, naïve, and unresponsive to peoples' lived experiences in the real world. Judges can undoubtedly simplify and depoliticize the doctrine by refusing to consider anything and everything “politics-related” when deciding constitutional cases. But at some point they would be operating against the backdrop of an informational universe that bears little resemblance to the one we actually inhabit. Some recognition of political realities may therefore be necessary in order to ensure that constitutional guarantees remain meaningful.

Of course, it is difficult to say where exactly judges should strike the balance between the twin extremes of total political agnosticism and total political awareness: Each extreme carries its own limitations and downside risks. But as I hope to have shown, I believe that courts can reasonably navigate these risks when evaluating and weighing motive-related communications that are made during the course of a political campaign. And I further believe that the exclusionary approach—which would shut down any such investigation altogether—would end up distorting motive-based review in unproductive ways. That is not to say that courts should exclusively consider campaign-related communications when identifying the government's reasons for acting; nor is it to say that the motive-revealing significance of a campaign communication ought always to outweigh anything that the government “officially” does. But I do think that such communications can provide a useful piece of the evidentiary puzzle—one that can be utilized without unduly compromising future campaigns, present-day governance, or the complexity of the doctrine at large. If the path to

power runs through a political campaign, then courts ought to assess the exercise of that power with the campaign itself in view.