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As Professors Simon[1] and Clark[2] both recognize, constitutional law has developed in significant degree into a process of differential justification. Once a person challenging the constitutionality of governmental action has passed the threshold of justiciability,[3] courts ask the government to justify the challenged action, imposing different standards of justification in various contexts. Clark and Simon both acknowledge that the purpose of this justification process can be stated in at least two different ways. First, the function of justification could be to convince the court that the constitutionally negative effects of the challenged action are outweighed by the constitutionally positive effects. In other words, the purpose of the justification process could be to show that a constitutionally acceptable "balance" or accommodation of competing interests has been achieved. Under this view, the standard of justification the government must meet depends on the nature

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1. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978).

2. Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978).

3. The challenger also might have to pass the threshold of "liberty" or of "property." *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1971). *See generally* Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS XVIII: DUE PROCESS 126 (1977).

and magnitude of the constitutionally negative effects that the court recognizes: the greater those effects, the more important or "compelling" the governmental interests must be, and the more "necessary" the challenged action must be to furthering those interests.[4]

On the other hand, the purpose of justification could be to prove that the government's action is not "caused by constitutionally illicit considerations" or, stated slightly differently, does not "have the purpose of furthering" constitutionally illicit goals or interests. Under this view, the standard of justification initially imposed[5] depends on the extent to which the mere fact of the government's action is probative of illicit motivation. The more probative the mere fact of the action is, the greater burden of justification the government initially must meet to convince the court that illicit motivation did not cause the government's action.

Although Simon and Clark both argue for the second or "motivational" view of the justification process, there is a significant difference in the scope of their respective arguments. Professor Simon limits his argument for the motivational view to cases involving racial equal protection. Professor Clark is more expansive, arguing for the motivational view in equal protection generally and in the first amendment, and indicating that it may well be the appropriate view in many other areas of constitutional law. Thus, their claims for the motivational view of the justification process have different force. Nevertheless, claims for the superiority and for the sufficiency of the motivational view are common to both articles, and it is to these claims that I wish to address my brief comment.

The Justification Process in Racial Equal Protection

Simon is fairly persuasive in arguing that proof that racial prejudice (as he defines it) caused governmental action should be a *sufficient* condition for judicial invalidation of the action. As his detailed discussion shows, there are difficult evidentiary problems in establishing this showing, but mainly for the reasons he gives, these problems probably are not beyond the competency of judicial resolution.[6] He is less persuasive, however, in arguing

4. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 70 (1972) (Marshall, J., dissenting).

5. As Simon explains, an initially low standard of justification might be raised if the person challenging the action presents other probative evidence that the action was caused by illicit motivation.

6. The remaining ambiguity in Simon's analysis is identifying *whose* racial prejudice is relevant in determining whether racial prejudice caused the government's action. As my colleague Norman Lane has asked, suppose that a racially

that proof of his definition of racial prejudice is a *necessary* condition for judicial invalidation, and two objections should be considered in assessing whether his claim for the necessity of proving racial prejudice also is convincing.

First, one could object that Simon has defined "racial prejudice" too narrowly. Following the famous "color-blind" rationale, one might argue that racial "prejudice" is simply the attitude that race is relevant to official decisionmaking, regardless of whether racial distinctions are used to hurt or to help members of minority racial groups.[7] I cannot evaluate the validity of this view of prejudice in any detail here, but it may be sufficient to note that the major difficulty is that this definition would preclude all attempts to use race as a criterion to remedy past prejudicial action, even de jure action; for in Simon's terms, a finding that racial prejudice caused governmental action allows no justification.

Second, one might argue that the motivational view is not and ought not to be a complete picture of the justification process in racial equal protection. That is, one might accept Simon's definition of prejudice and agree that action caused by it should be invalidated but argue that the justification process also serves, and ought to serve, a balancing-of-effects function. In other words, one would say that the justification process also serves to identify instances in which the negative effects of governmental action are sufficient basis for invalidation under "racial" equal protection, even though that action is not caused by racial prejudice.

How would such an argument proceed? First, one might argue that the equal protection clause prohibits significant "disproportionate negative impacts" on minority racial groups, even if those impacts are not "caused by racial prejudice."[8] This is a most troublesome line of argument, however. First, as Simon shows, there will be few, if any, instances in which there will be signifi-

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prejudiced citizen reports a crime to the police that he would not have reported but for the fact that the perpetrator belonged to a racial minority. Assuming that the report was a necessary condition for governmental action, do the arrest and prosecution constitute government action caused by racial prejudice? If not, what about governmental response to the economic consequences of the racial prejudice of its citizens, such as a boycott of integrated facilities that reduces the revenues from these facilities and causes them to run at a financial loss? Does closing the financially troubled facilities constitute action caused by prejudice?

7. *See, e.g.*, Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 22.

8. *See, e.g.*, Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

cant negative disportionate impacts on minority groups in the absence of racial prejudice. Hence the need for an additional balancing analysis is difficult to perceive. Second, and perhaps more important, the argument is tantamount to urging that government has an affirmative duty to take race into account and to design its action so that racial groups are benefitted or burdened proportionately. Recognition of this duty would perpetuate racial consciousness and institutionalize decisionmaking along racial lines, both of which may be viewed as inconsistent with the long-term goals of the equal protection clause.

But there is another line of argument that could be advanced in support of the view that the justification process serves a balancing function in racial equal protection. One would begin by urging that while one point of the equal protection clause is to remove racial prejudice from the process of governmental decisionmaking, the clause should also be viewed as embodying a compatible and more general goal: to create a society in which race is as relevant to governmental decisionmaking as, for example, eye color is presently. In other words, the general goal of the clause is to produce a society in which distinctions based on race are eliminated from all but the most inconsequential of official decisionmaking. Racially prejudiced action is, of course, prohibited, but nonprejudiced action that uses race as a decisionmaking criterion is nevertheless still suspect because of its tendency to foster race consciousness, to ingrain stereotypical thinking, and to cause competition and even hostility among racial groups, thus exacerbating the society's racist tendency to identify and then to judge persons on the basis of the racial group to which they belong. To say that nonprejudiced use of race is suspect is not to say that it is invalid, however, because the clause recognizes that short-term racial classifications and their consequences must sometimes be endured to remedy past prejudicial action and to achieve the long-term integrative goals of the clause.

In other words, one would argue that even the benign use of race should be viewed as prima facie constitutionally undesirable because, as a general proposition, the equal protection clause has dedicated society to the irrelevance of race as a criterion for governmental action.[9] The purpose of the justification process thus would be to convince the court that the government is nevertheless justified in considering race because it could not move toward its acceptable nonprejudiced goals, including the ultimate goal of racial irrelevance, by other reasonably feasible means.

9. *See, e.g.*, Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 379 (1966).

Suppose, for example, that the government adopted an explicit racial quota for employment in a governmental agency, a quota requiring that fifteen percent of its employees at all levels be members of racial minorities. Under a motivational analysis, the court would ask only whether prejudice caused the use of the racial quota. Viewed in a broader perspective, the justification process also would require the court to determine whether other reasonably feasible means existed of achieving an integrated work force.

This balancing process would require the court to assess the extent to which other selection criteria and other recruitment methods would serve to produce a reasonably integrated work force in the agency. Thus the court might ask, contrary to the Supreme Court's and Professor Simon's analyses of *Morton v. Mancari*,[10] whether the Bureau of Indian Affairs' use of an explicit racial preference not only is truly benign but also is an acceptable compromise between the negative effects of overt racial classifications and the government's positive goals. The court might conclude that upgrading the education the federal government provides is, on balance, preferable to an explicit racial classification even though, as Simon points out, this would be a less effective method of increasing the representation of Indians in the Bureau of Indian Affairs. Similarly, in the case of preferential racial admissions programs, the court would seek to determine whether there were reasonably feasible criteria other than race that would serve the legitimate goals of the admissions program. I do not mean to indicate that *Morton* was necessarily wrongly decided, or that the California Supreme Court reached the right result in *Bakke v. Regents of the University of California*,[11] but rather only to indicate that there is a plausible additional analysis for the court to undertake even though it is satisfied that the racial preference is not the result of racial prejudice.

Whether the justification process is viewed only in motivational terms or in both motivational and balancing terms thus can have an impact on the case outcomes. Motivational analysis will lead to the validation of nonprejudiced action which an additional balanc-

10. 417 U.S. 535 (1974).
11. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977) (No. 76-811).

ing analysis might invalidate. Is such a balancing analysis appropriate in racial equal protection?

The issue is one of institutional competence. First, I think that the equal protection clause should be read as cautioning against the use of racial criteria, not simply because such criteria are likely to be the result of racial prejudice but also because, at least in the short term, they often can cause the constitutionally negative effects of promoting race consciousness, competition among racial groups, and political organization along racial lines, and thus often hinder achievement of the ultimate objectives of the clause. Thus initial decisionmakers should attempt to avoid drawing distinctions based on race, utilizing such distinctions only where other distinctions simply will not suffice to achieve important non-racial goals or to achieve the long-term positive goal of racial irrelevance in governmental decisionmaking.

But even accepting this view of the equal protection clause, the question still remains whether the judicial role should be limited to determining that racial prejudice did not cause the government's action, or whether it should also include an evaluation of whether the initial decisionmaker has made an appropriate accommodation between the negative and the positive effects of the racial classification. The argument in favor of limiting the judicial role to the search for racial prejudice is two-fold. First, in the absence of prejudice, there is no need for the substitution of judicial judgment for the political judgment that the positive effects outweigh the negative effects. Once it is determined that the government's action is not the result of racial prejudice, the two justifications of judicial intervention, stigma and process distortion, no longer are present. The use of race, no different from the use of any other criteria, involves debatable trade-offs about which the judiciary has no special competence. Second, because principles are difficult if not impossible to announce when the judiciary balances positive and negative effects, the judiciary will be unable to produce principled guidelines to tell well-intentioned decisionmakers when they may use race as a criterion. Reasonable minds, of course, can differ, but on balance neither of these objections to judicial review of the nonprejudiced use of race seems decisive.

The problems of ad hoc balancing do not seem more difficult than the problems of ad hoc decisionmaking involved in the particularized and individualized judgments that the motivational theory requires the courts to make. If a positive reason exists for the judiciary to act as a brake on the nonprejudiced use of race as a decisionmaking criterion, the fact that the judicial review in-

volves a balancing or an accommodating of interests should not by itself preclude this function.

However, the lack of process distortion is far more troublesome. In the absence of racial prejudice—and hence of the distortion of the political process—why should the courts substitute their judgment about the utility of using race as a decisionmaking criterion for the judgment of the political branches? The answer must be, simply, that sufficient reason exists to believe that the political branches may be insensitive to the negative effects of a racial classification and its threat to the ultimate goals of the equal protection clause, so that a relatively unpolitical and more sensitive check on the necessity for the use of racial criteria is desirable. Why would the political branches be insensitive? Often the initial nonprejudiced use of a racial classification will seem politically desirable because the impacts on the majority race will be slight and will be limited to a small, and perhaps politically impotent, segment of this race. The political response to others who may complain about the special treatment of a racial group often is not to eliminate the first preference but to grant others. This step-by-step process can lead to an officially racially classified society in which each racial group *qua* racial group vies for its "proportionate" share in a number of important areas.

Because they are more isolated from interest and pressure groups and hence are more capable of taking the longer view, the courts can act as an important brake on this political tendency toward racial classification and polarization. Courts can require government to show that a substantial need exists to employ racial criteria, that reasonably feasible alternatives have been explored and are unsatisfactory, and that race is in effect being employed reluctantly. The courts also can require periodic showings that a racial classification continues to be justified.

Whether the judiciary should do more than invalidate action caused by racial prejudice doubtless is a very close issue. If one believes that the judiciary can play a beneficial role in casting a skeptical eye on the nonprejudiced use of race, the search for illicit motivation would not be the sole function of the justification process. The justification process in racial equal protection would have both motivational and balancing functions. Motivational analysis would be used for two purposes. First, as Simon describes, it would be used to determine whether racial prejudice

caused the action. If the answer is in the affirmative, no further analysis is required, and the action should be invalidated.

Second, if the action does not use race overtly, motivational analysis would be used to determine whether government is covertly using race as a decisionmaking criterion. For example, an employment test producing a disproportionately large number of minority workers might be challenged as a covert means of making racial classifications, and motivational analysis would be used to determine whether in fact the test was a covert racial classification. If the test does not use race overtly or covertly, no further analysis is needed, and the court should sustain the action.

If the court finds that a racial criterion has been employed, either overtly or covertly, a further balancing analysis is required to determine whether use of this criterion is justified. In our society, the nonprejudiced use of race will often but not necessarily always be sustained as the only feasible way of remedying past prejudiced action and of ultimately producing an integrated society in which race will be irrelevant in official decisionmaking.

The Justification Process in the First Amendment

Clark and Simon both suggest that the motivational view of the justification process may be the correct and complete view in all areas of "suspect classification" adjudication. For the reasons just stated, although the motivational view may well have great explanatory and normative force in these areas, it may well not provide a complete view of the justification process. It seems far less likely that, as Clark argues, the motivational view provides a complete description of the justification process in cases involving fundamental interests or the first amendment.

Clark recognizes that the Court's opinions often explicitly adopt language suggesting that the purpose of the justification process in first amendment cases is a balancing of constitutionally relevant effects. His argument seems to be that the results in the cases also can often be understood in motivational terms and that the courts would decide first amendment cases more appropriately if they understood the justification process as a search for illicit motivation. Clark argues that the first amendment is needed "primarily to protect against invidiously motivated suppression of unpopular points of view," and he urges that the justification process should be aimed at determining whether governmental action, including action barring speech because of its content, is so motivated.

The key to this approach is, of course, in determining when the purpose of suppressing or of punishing "given points of view" is

"invidiously motivated." Clark states, for example, that a law classifying on the basis of speech content is suspect of an "invidious motivation" to suppress speech, and he argues that the suspicion of "invidious motivation" can be rebutted only "by showing a compelling state interest, an interest which is usually described in terms of the likelihood the speech produces a clear and present danger of a substantive evil the state has a right to prevent." This example and Clark's other examples of disproving "invidious motivation" seem to make clear that the "invidiousness" of the desire to suppress speech is to be determined by analysis of the scope of the constitutional protection of expression. In other words, the desire to suppress speech becomes "invidious" only when the suppression is not a proper balance or accommodation of first amendment and other regulatory values. If this is so, it is not clear what is gained by talking of the justification process in motivational terms.

Motivation analysis could describe part of the justification process in first amendment cases if the courts were willing to go behind the terms of the legislation and determine whether the real purpose of the legislation is to suppress speech. Of course, a finding that the desire to suppress speech caused the government's action would not necessarily lead to invalidation because, perhaps, the speech could constitutionally be suppressed. A court could nevertheless use motivation analysis to identify instances of covert suppression. Interestingly, although he suggests that motivation analysis might be used in this way, Clark seems very reluctant to use motivation analysis in this fashion as his discussion of one of the cases that piqued interest in motivation analysis shows.[12]

Clark says that because the statute in *United States v. O'Brien*[13] did not create a classification based on speech content, "no strong presumption of illicit motivation arises," and thus the government can justify its action by showing "only a rational connection to a valid state interest." However, as Clark recognizes, the facts surrounding the enactment of the ban on knowing destruction of a draft card provided very strong evidence that Congress's purpose was to suppress a certain form of effective

12. Clark states that in Grosjean v. American Press Co., 297 U.S. 233 (1936), the Court appropriately considered "specific, historical facts surrounding a particular piece of legislation."
13. 391 U.S. 367 (1968).

communication of an unpopular point of view.[14] It seems inconsistent to argue that the judiciary should seek to ascertain whether action is motivated or caused by a desire or a purpose to suppress speech and at the same time maintain that *O'Brien* evidences no such purpose. Imagine, for example, that instead of supressing speech the case had involved a practice primarily engaged in by blacks. Most would not consider the flimsy justifications offered by the government sufficient to disprove racial prejudice, at least if one were willing, like Simon and unlike the Supreme Court in *O'Brien*, to accept evidence of motivation other than the inferences that can be drawn from the terms of the legislation.

CONCLUSION

The content and the purpose of the justification process are two of the most important and most perplexing issues in constitutional law. These two articles show that motivation analysis may explain and perhaps should constitute the function of the justification process in certain areas of constitutional adjudication. Yet the search for illicit motivation is neither a complete explanation of what the courts have been doing nor a desirable prescription of all that they should do. Nevertheless, these articles and the articles on which they build have done much to advance thinking about the nature of constitutional limitations on governmental action and the role of the judiciary in enforcing these limitations.

14. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 87-101 (1975).