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The Centrality and Limits of Motivation Analysis

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The Costs of Motive-Centered Inquiry

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Washington v. Davis\(^1\) was as ill a wind as any experienced by our constitutional law in recent memory; yet it has already produced some positive results. It has, after all, supplied a doctrinal basis for overruling Palmer v. Thompson.\(^2\) It has also given us this Colloquium.

Professors Simon\(^3\) and Clark\(^4\) both argue, persuasively, that an improper motive for governmental action is independently relevant to the question of the action’s constitutionality, irrespective of any showing that the action produces harmful effects. In the racial context, Professor Simon appears to stake out a broader ground, arguing that the question of prejudiced motive is the question on which constitutionality turns. Both authors agree that the effects of governmental action may be evidence of improper motive—a proposition having the support of the Supreme Court itself, at least when the effects leave little room for doubting the presence of an improper motive.\(^5\)

The easy case is the one in which the government acts for an evil purpose and achieves it. Palmer v. Thompson was such a case, despite the Court’s pretense that the closing of the city’s swimming pools in response to a desegregation order had only ra-

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cularly neutral effects. What is troubling is the opposite suggestion: that an improper motive is not only a sufficient condition for holding governmental action unconstitutional, but a necessary condition for that result. *Washington v. Davis* and its ungainly progeny oblige us to live with this principle for a season. To the extent that Professors Clark and Simon are making the best of this gloomy situation, we should be grateful for their contributions to a doctrinal scheme that in some extreme cases may moderate the corrosive effects of *Washington v. Davis*. Professor Simon, however, seems to be going much further, not only tolerating *Washington v. Davis* but making its principle the central feature of a constitutional theory of racial equality. In this comment I sketch two reasons why such a motive-centered theory, if it becomes entrenched as constitutional doctrine, will damage the cause of racial justice in this country.

A doctrine demanding proof of a racially prejudiced motive before governmental action can be held unconstitutional will focus a court's inquiry on the good faith of various officials. Even so, much of the evidence in such a race-relations case will necessarily be devoted to proving the harmful and racially disproportionate effects of the action. One of the oldest maxims of the common law holds that "[e]very man must be taken to contemplate the probable consequences of the act he does." Justice Stevens wrote a special concurrence in *Washington v. Davis* to make sure that this evidentiary door was kept open. However, even though the proof will center on the effects of what officials have done, the ultimate issue will be posed in terms of the goodness or the evil of the officials' hearts. Courts have long regarded such inquiries as unseemly, as the legislative investigation cases of the 1950's attest. The principal concern here is not that tender judicial sensibilities may be bruised, but that a judge's reluctance to challenge the purity of other officials' motives may cause her to fail to recognize valid claims of racial discrimination even when

6. Surely the most serious harm in closing the pools was not the denial of public swimming, but the support thus given to the systematic degradation of blacks as an inferior race. So viewed, the case fits easily into the most satisfactory rationale for Brown v. Board of Educ., 347 U.S. 483 (1954). See Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).
10. 426 U.S. at 252 (Stevens, J., concurring).
the motives for governmental action are highly suspect. Because an individual's behavior results from the interaction of a multitude of motives, and because racial attitudes often operate at the margin of consciousness, in any given case there almost certainly will be an opportunity for a government official to argue that his action was prompted by racially neutral considerations. When that argument is made, should we not expect the judge to give the official the benefit of the moral doubt? When the governmental action is the product of a group decision, will not that tendency toward generosity be heightened?

The first objection to a motive-centered doctrine of racial discrimination, then, is that it places a "very heavy burden" of persuasion on the wrong side of the dispute, to the severe detriment of the constitutional protection of racial equality. The second objection is even more serious. A motive-centered theory forces the litigants in a race case into name-calling on one side and self-righteousness on the other. The parties, like the judge, will treat the facts of racial inequality (in education, in housing, or in other areas) as though their only importance were the light they might throw on the question of officials' motivational purity. However, the facts of racial inequality are the real problem. It is bad enough that a motive-centered inquiry should distract the lawsuit from focusing on the community's real ills. Worse still is the effect of this inquiry on race relations outside the litigation process. The effective parties to the typical racial discrimination case, as distinguished from the named parties, are institutional litigants—for example, the NAACP versus the school board or the city planners. These people are locked into a continuing relationship, touching a number of race-relations issues. They were negotiating before the lawsuit began, and they will be dealing with each other after it ends—if, indeed, a school desegregation case ever ends. A constitutional doctrine of racial discrimination centered on the motives of government officials will inevitably poison the atmosphere for these negotiations. Name-calling and indignation will, to some significant extent, displace the effort to deal with the racial inequality itself. The improvement of race relations is difficult enough when the parties to such negotiations concern themselves with the questions of the actual extent of ra-

12. This is the Court's term for the presumption the state must overcome in order to justify explicit racial discrimination. Loving v. Virginia, 388 U.S. 1, 9 (1967).
cial inequalities and with the costs of lessening them. When accusations of bad faith are added to the mix, the resulting negative emotional charge can only hinder the process of healthy resolution of a community's racial problems.

To focus constitutional doctrine on the facts of racial inequality and on the costs of equalization would not disable the courts from dealing with clear-cut cases of improper governmental motive; abandoning Washington v. Davis, in other words, need not revive Palmer v. Thompson. A court fully persuaded that a government official has acted for the purpose of harming members of a racial minority should hold the official's action unconstitutional when the action causes harm to its intended victims. Where the evidence is less clear, but the judge is conscious that an official may have acted for an evil purpose, no constitutional doctrine will erase this consciousness. A court suspecting an improper governmental motive, however, need not make such a finding explicit in order to hold the action invalid. Rather, the court can examine closely the governmental interest offered in justification for the action that has produced racially disproportionate harm. If the court concludes that the action does not significantly promote a legitimate and important governmental objective, it can strike down the action because of its racially disproportionate harms without any discussion of motive at all.\(^1\)

In a number of first amendment decisions, many of them with racial overtones, the Supreme Court has adopted this course. The Court has, for example, given protection to the constitutional interest in associational privacy in cases in which governmental motives were suspect; but it has managed to do so without saying, for example, that the Florida Legislative Investigation Committee was seeking to expose individuals for exposure's sake,\(^4\) or that the Arkansas legislature wanted to expose members of the NAACP holding teaching jobs so they could be hounded out of their employment.\(^5\) By avoiding accusations of bad faith, the Court surely avoided handing a political weapon to the racial intransigents in these two states. Now that the problem of racial inequality is seen clearly as a national problem, should not the Court draw wisdom from its own experience in assisting the birth of the New South?

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\(^{13}\) See generally Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36, 36 (1977).
