

# A Brief Comment on Motivation and Impact

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This comment focuses on two distinct problems: the relevance of motivation and the significance of disproportionate racial impact.

## THE RELEVANCE OF MOTIVATION

Professor Ely's groundbreaking article<sup>1</sup> presented the first comprehensive theory of the relevance of legislative and administrative motivation to constitutional adjudication. Ely's theory is flawed, largely for the reasons given by Professor Brest in his perceptive article.<sup>2</sup> No subsequent commentary has significantly improved on Brest's theory of the relevance of motivation, a theory in part recently endorsed by the Supreme Court.<sup>3</sup> In this brief comment, I aim not to add anything novel to the already ample and sometimes confusing and confused discussion of motivation. I hope to state as precisely and as simply as possible, and thereby to clarify, why and to which sorts of constitutional claims motiva-

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1. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

2. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95. Others have endorsed Brest's critique. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW 596 n.12 (1978).

3. Compare *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), with Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

tion is relevant. Because of space constraints, I must be telegraphic.

In order to be constitutional, every law<sup>4</sup> must satisfy two basic conditions: First, the law must be an exercise of a delegated (in the case of the national government) or a reserved (in the case of a state government) power; second, the law must resolve competing interests in a manner that respects the priority these interests have under the Constitution.<sup>5</sup> With respect to the second condition, one should note that every law represents a complex normative judgment—a decision that a certain interest (or interests) ought to be served; a decision that the interest ought to be served in a particular way, that is, by means of the law in question; and a decision to accept whatever cost of disserving (abridging) a competing interest (or interests) the law entails. In general terms, the second condition of constitutionality requires that the interest(s) the legislature intended the law to serve (governmental interest), factored by the extent to which the law actually serves this interest,<sup>6</sup> be weightier than the interest(s) the law disserves (private interest), factored by the extent to which the law disserves this interest. Obviously, a court cannot determine whether a law satisfies the second basic condition of constitutionality unless the court knows what interest the legislature intended the law to serve. After all—and this is crucial—at issue is the constitutionality of the complex normative judgment the lawmaker actually reached, not the constitutionality of some judicially “conceivable” normative judgment the lawmaker did not reach. What counts, in short, is not some normative judgment that could but does not underlie the law, but rather the normative judgment that in fact underlies the law.<sup>7</sup> Therefore, legislative intent is indisputably relevant to constitutional adjudication—specifically, to adjudication of claims that a law fails the second condition.

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4. I am concerned in this comment with legislative intent, not the intent underlying a particular adjudication. Compare *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (discussion of relevance of legislative intent), with *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 281-87 (1977) (discussion of relevance of intent underlying particular adjudication). Of course, courts and administrative bodies legislate as well as adjudicate—indeed, they legislate as they adjudicate—and where a judicial or an administrative body legislates (explicitly or implicitly) a particular rule, the rule entails a particular “legislative” intent.

5. “Constitution” denotes more than the written Constitution: Not all constitutionally protected interests are referable to the constitutional text. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

6. And with reference to the possibility of alternative ways of serving the interest.

7. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). But see text accompanying note 12 *infra*.

Of course, if the private interest the law disserves is one the lawmaker is under an absolute duty not to abridge, no inquiry into legislative intent is necessary: The law is unconstitutional whatever the governmental interest and whatever the extent to which it serves that interest.<sup>8</sup> In this sense, a law can be unconstitutional because of its effect—that is, because it has the effect of abridging a particular private interest—without regard to legislative intent. More frequently, however—specifically, where the private interest the law disserves is constitutionally “fundamental”—the lawmaker’s duty is presumptive, not absolute: It is a duty not to abridge without sufficient reason. With respect to laws having the effect of abridging such interests, an inquiry into legislative intent is necessary: Because the law is unconstitutional if the interest the legislature intended the law to serve is not “compelling” (or “important”),<sup>9</sup> the court needs to know what this interest is.

Legislative intent is relevant to adjudication of two distinct sorts of constitutional claims. First, a claim that *X* is the governmental interest and that *X* is illegitimate necessitates an inquiry whether *X* is in fact the interest the legislature intended the law to serve. Actually, the claim would be that *X* is *one* interest—whether or not the only one—the law was intended to serve, that *X* is illegitimate, and that the legislature would not have enacted the law but for its decision that *X* ought to be served.<sup>10</sup> Second, a claim that *X* is the governmental interest and that *X* is legitimate but that the law does not serve *X* to any or to an adequate extent

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8. One might say that an absolute duty not to abridge a particular interest means that a law abridging that interest is not an exercise of a delegated or reserved constitutional power and thus fails the first basic condition of constitutionality.

9. Or if the law fails to serve a compelling interest to a “substantial” extent, or if there exists a “less restrictive” way of serving that interest to virtually the same extent.

10. The defender of the law bears the burden of proving that the desire to serve the illegitimate interest was not a but for cause of the law. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977); Comment, *Proof of Racially Discriminatory Intent Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburg*, 12 HARV. C.R.-C.L. L. REV. 725, 752-55 (1977) (comparing the Supreme Court’s approach to the problem of proof of discriminatory intent in *Arlington Heights* with that of the United States Court of Appeals for the Eighth Circuit in *United States v. School Dist. (Omaha I)*, 521 F.2d 530 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975), *reaff’d per curiam*, 541 F.2d 708 (*en banc*) (*Omaha II*), *vacated per curiam*, 433 U.S. 667, *reaff’d per curiam*, 565 F.2d 127 (1977) (*en banc*) (*Omaha III*)). See note 22 *infra*.

necessitates an inquiry whether *X* is the interest the legislature intended the law to serve.<sup>11</sup> Of course, as a practical, institutional matter, a court's incentive to pause to inquire whether *X* is in fact the interest the legislature intended the law to serve is considerably diminished where the abridged private interest is not deemed particularly weighty, and the law serves (is rationally related to) *some* legitimate interest.<sup>12</sup> Commentators on motivation have paid little if any attention to the relevance of legislative intent to adjudication of the second sort of claim.<sup>13</sup> The Supreme Court, however, recently emphasized the importance of intent with respect to such claims.<sup>14</sup>

The state action/inaction issue discussed by Professor Clark<sup>15</sup> can be simplified in the following terms. Certain interests are not legitimate objects of governmental pursuit. Disadvantaging a person because she possesses African ancestry or because she engages in political dissent is such an interest. Where government affirmatively imposes a burden on persons engaging in political dissent in order to discourage or to punish their dissent, government's action is unconstitutional.<sup>16</sup> Where government grants a

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11. No law is enacted for "no reason": Every deliberate act, including every law, is by definition undertaken for a (or many) reason(s). Thus, one can say that every law was intended to serve some interest(s) and that the interest is either legitimate or illegitimate. If the interest is illegitimate, the law is unconstitutional; if the interest is legitimate, the law either serves the interest, or it does not. If it does not serve the interest, the law is unconstitutional: The government's side of the balance—the governmental interest *factored by the extent to which the law serves that interest*—is zero. Therefore, to say that a law is "arbitrary" in the sense of serving (rationally relating to) no governmental interest is necessarily to say one of three things: (1) The law serves no *legitimate* governmental interest—that is, it serves only an illegitimate interest; (2) the law does not serve the legitimate governmental interest(s) the legislature intended it to serve; or (3) it is impossible to ascertain which interest among several possible interests the legislature intended the law to serve and thus impossible to say whether the law serves whatever interest(s) the legislature intended it to serve.

12. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

13. See Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 146-49 (1977); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). However, in his treatise Professor Tribe addresses the issue of the relevance of legislative intent to adjudication of the second sort of constitutional claim. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1085-88 (1978).

14. Compare *Califano v. Goldfarb*, 430 U.S. 199 (1977), with *Califano v. Webster*, 430 U.S. 313 (1977). See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1085-88; text accompanying note 7 *supra*.

15. Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 1011-24 (1978).

16. Where government, in an effort to serve some *legitimate* interest (that is, not in order to discourage or to punish dissent), affirmatively imposes a burden on

benefit to persons with a certain need in order to relieve that need, but for purposes of discouraging or of punishing dissent withholds the benefit from persons who, but for their involvement in political dissent, would receive the benefit, government's inaction in the form of withholding the benefit is unconstitutional.<sup>17</sup> For example, while government may give economic subsidies to needy newspapers in rural communities, government may not simultaneously withhold such subsidies from needy newspapers refusing to sign an agreement not to carry editorials critical of government. Therefore, legislative intent is relevant to adjudication of claims respecting state "inaction" in the form of withholding benefits otherwise granted: Whether such a policy is constitutional depends on whether the withholding is intended to serve a legitimate interest.<sup>18</sup>

The real issue with respect to legislative intent, as the Supreme Court now recognizes,<sup>19</sup> is not whether legislative intent is relevant, but how it can be ascertained, especially where a lawmaker is a collection of persons and the law, although ostensibly (on its face) serving a legitimate interest, is claimed to have been intended to serve an illegitimate one. The difficulties of ascertaining intent, however, are not impregnable, and the Court, following the commentators,<sup>20</sup> already has begun to develop the necessary evi-

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persons engaging in political dissent, its action (if constitutional at all) must satisfy the "strict scrutiny" test of constitutionality. See note 9 and accompanying text *supra*.

17. If the withholding is an effort to serve a legitimate interest, government's action is presumptively unconstitutional and thus subject to strict scrutiny. See note 16 *supra*.

18. See Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J., 1191, 1193, 1201 (1978) (arguing that benefit-withholding policy sustained in *Maher v. Roe*, 432 U.S. 464 (1977), was unconstitutional because it intended to discourage constitutionally protected activity (abortion)).

Assume that a legislature declines to establish a benefit program at all *solely* in order to avoid (for example) benefitting blacks. Although a legislator declining to act solely (or even principally) for this reason violates his oath of loyalty to the Constitution, and although in theory such state inaction is unconstitutional, as a practical matter a court cannot be expected to require the legislature to establish the benefit program: Frequently, selective (discriminatory) inaction in the form of benefit withholding cannot be adequately explained by constitutionally legitimate reasons, but legislators almost always will have given good reasons in explanation of not acting at all.

19. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

20. The Court has especially relied upon Brest. See Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Motive*, 1971 SUP. CT. REV. 95.

dentiary rules (presumptions and burdens of proof and of going forward).<sup>21</sup> Such rules, like evidentiary rules in other contexts, must be fashioned with sensitivity to both the realities of litigation and the substantive (constitutional) principles at stake.<sup>22</sup>

#### THE SIGNIFICANCE OF DISPROPORTIONATE RACIAL IMPACT

I have discussed the issue of disproportionate racial impact (DRI) elsewhere.<sup>23</sup> Against the background of that discussion, I would like to comment on Professor Eisenberg's recent admirable essay, *The Role of Impact*.<sup>24</sup>

My ultimate conclusion with respect to the significance of DRI is that any law having a DRI ought to be subject to an unusually heavy burden of justification—which is not to say that it ought to be struck down—for the simple reason that the disproportionate character of the impact is not ethically neutral but is a function of

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21. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-68, 270 n.21 (1977).

22. Sketched below are three basic evidentiary approaches to the problem of ascertaining illicit motivation.

First, if "plaintiff" (the party challenging the state action) can establish that the challenged action (law) is not facially neutral but instead entails a constitutionally suspect distinction, government must show that the interest(s) the legislature intended the law to serve is compelling, that the law substantially serves the interest(s), and that no less restrictive law will serve as well.

Second, if the challenged law is facially neutral, plaintiff bears the burden of showing that a desire to serve an illicit interest was a cause of the law ("a motivating factor"), whereupon the burden shifts to the government to establish that the desire was not a but for cause. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). *Query*: should not government be required to establish in this regard that the licit interest(s) the legislature allegedly intended the law to serve is weighty and that the law substantially serves the interest?

Third, if plaintiff can establish that the challenged law, although facially neutral, has a foreseeable disproportionate racial impact, government bears the burden of showing that a desire to serve a racially discriminatory interest was not a cause or, if a cause, not a but for cause of the law. See Comment, *Proof of Racially Discriminatory Intent Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburg*, 12 HARV. C.R.-C.L. L. REV. 725, 752-55 (1977) (discussing the "Omaha presumption").

Note that with respect to proof of racially discriminatory motivation, this third approach would largely displace the *Arlington Heights* approach: Virtually every facially neutral law a plaintiff would challenge as racially motivated would have a foreseeable disproportionate racial impact. *But see* *Palmer v. Thompson*, 403 U.S. 217 (1971). *Query*: Because under the *Omaha* presumption plaintiff does not bear the difficult burden of showing that racially discriminatory motive was a cause, but rather, government bears the burden of showing that the presumed illicit motive was not a but for cause, is not the *Omaha* presumption preferable to the *Arlington Heights* approach? *But see* text accompanying note 27 *infra*. See note 38 *infra*.

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

24. Eisenberg, *supra* note 13, at 42-99. This article comprises two distinct discussions, *The Role of Impact, id.*, and *The Role of Motive, id.*, at 99-168.

prior massive societal discrimination against blacks. A lawmaker ought to be required to explain his reasons for taking action exacerbating the already severely disadvantaged position of blacks in American society. In short, a black person's interest in not being disadvantaged in a way that is largely and ultimately a consequence of prior societal discrimination is more weighty than, for example, an optician's interest in duplicating lenses without a prescription.<sup>25</sup> A law having a DRI should be deemed constitutional only if the governmental interest(s), factored by the extent to which the law serves (and with reference to the possibility of alternate ways of serving) this interest, is weightier than the black person's interests factored by the extent to which the law abridges the interests. The interests of the black person include not only the general interest specified above *but also* the particular interest at stake (for example, a job, housing in a racially balanced community, or a seat in a racially balanced school).

Pursuant to Eisenberg's "causation principle,"<sup>26</sup> a particular instance of DRI is constitutionally significant—that is, the particular instance triggers an unusually heavy burden of justification—if and only if:

(1) The DRI would not exist or would be less drastic but for intentional racial discrimination, *either* (a) by government, prior to the governmental act having the DRI that is the subject of challenge, *or* (b) by a private actor or actors, subsequent to the governmental act challenged; *and*

(2) Either the prior governmental discrimination or the subsequent private discrimination is the "proximate cause" of the DRI.

Condition (1) (a) seems either ill-advised or largely superfluous. If Eisenberg means to require that a black plaintiff prove the *specific* acts of prior governmental discrimination that are a but for cause of the particular DRI about which she is complaining, then why should the plaintiff be subjected to the onerous burden—onerous in terms not only of time and expense but also of difficulty of proof and so of possibility of failure—of establishing according to rules of evidence that which may be difficult to prove specifically but can fairly be assumed generally? If Eisenberg does not mean to require that the plaintiff establish specific acts, then the condition is largely unnecessary. As Eisenberg himself

25. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

26. See Eisenberg, *supra* note 13, at 57-83.

notes, “[g]iven the tragic history of relations between the races in this country, nearly all current uneven impact may ultimately be traceable to prior official discrimination.”<sup>27</sup>

Condition (1)(b) seems anomalous in a theory of the significance of DRI. In illustrating this condition, Eisenberg uses the example of government giving a scarce resource, a liquor license, to a private club that refuses to serve blacks. However, in such a situation, where the subsequent private discrimination clearly has a direct racial impact, rather than the governmental action (the licensing), impact is not the issue. The issue is whether and to what extent government should be deemed a complicitor (or even an active partner) in the private discrimination.<sup>28</sup> It is puzzling why this “state action” issue—which of course is an extremely important issue—should be discussed or conceptualized *in terms of* a theory of the significance of DRI.

Eisenberg means to serve two policies by specifying condition (2): first, “the need to ‘draw the line somewhere so that liability will not crush those on whom it is put’ ”;<sup>29</sup> second, “the need ‘to work out rules which are feasible to administer, and yield a workable degree of certainty.’ ”<sup>30</sup> Consider the second policy first: As a matter simply of feasibility and of workability, obviously a proximate cause condition is less desirable than no proximate cause condition because the condition necessitates difficult line-drawing respecting matters of degree, intervening causes, and the like. Now, consider the first policy—the need to draw the line somewhere so that liability will not crush those on whom it is put: On whom would liability be put? The governmental agency (or some responsible principal) whose action is challenged? However, whether in terms of the burden to the agency the challenged action should be sustained or overturned is the sort of issue that should be resolved at the “balancing” stage, *after* the court has

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27. *Id.*, at 54. Eisenberg writes:

There are limits on how far a court should go, as a matter of constitutional law, in compelling government officials to justify uneven impact simply because it is traceable to official discrimination at some earlier point in time. At some point, the connection to prior discrimination is too remote for courts to act.

*Id.*, at 55. The meaning of “too remote” is unclear. Perhaps, on the one hand, the relationship between massive, pervasive prior discrimination against blacks, and on the other hand, the greater poverty, poorer academic attainment, and residential isolation among blacks today is neither easily quantified nor calibrated. However, the relationship is anything but remote: It is profound.

28. Eisenberg states: “[In private racial discrimination cases] uneven impact is usually apparent. The more likely issue in [such] cases is whether there is a sufficient connection between the challenged state action and the private race-dependent decision.” *Id.*, at 67.

29. *Id.*, at 59 (quoting James & Perry, *Legal Cause*, 60 YALE L.J. 761, 784 (1951)).

30. *Id.* (quoting James & Perry, *Legal Cause*, 60 YALE L.J. 761, 784 (1951)).



determined that the requisite showing has triggered an unusually heavy burden of justification. Eisenberg recognizes that once this burden of justification has been triggered, the court must balance the competing interests.<sup>31</sup> Whether "liability" in a particular case will be sufficiently "crushing" that on balance it ought not to be imposed is an issue appropriately considered at the stage of a case where a court is weighing competing interests.<sup>32</sup>

31. *E.g., id.*, at 72.

32. Would liability be put on anyone besides the challenged governmental agency? Eisenberg indicates that it would: "In a society of finite resources and opportunities, the avoidance of uneven impact resulting from past discrimination often will impose substantial costs on innocent third parties. Increased minority representation in professional schools, for example, may come at the expense of qualified white students." *Id.*, at 60.

Eisenberg seems to confuse affirmative action theory with DRI theory. The latter theory, unlike the former, does not call for the allocation of scarce goods and resources specifically to racial minorities with the consequence that these scarce goods and resources are denied specifically to at least some non-minority persons. DRI theory requires only that government, in certain contexts, not needlessly rely on laws or practices disadvantaging the poor or the poorly educated (a disproportionate number of whom are black) or on laws or practices reinforcing racial isolation. (A poor or poorly educated white person benefits from the absence of laws disadvantaging poor or poorly educated persons no less than a poor or poorly educated black.) DRI theory, unlike affirmative action theory, would require (to use Eisenberg's example) only that criteria for admission to professional school, if the criteria have a DRI, be substantially related to academic or to professional potential and to ability to (best) succeed in school or in the profession, and that there be no less burdensome criteria or methods of admission serving the same goals. See Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 561, 568 n.131 (1977).

Finally, Eisenberg takes issue with an argument of mine. Compare Perry, *id.* at 566-71, with Eisenberg, *supra* note 13, at 97 n.286. For the reader interested in evaluating this dispute, the following clarification might prove useful. In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court rejected the notion that DRI is constitutionally significant (except insofar as it evidences illicit intent) in part because the Court feared that if accepted, the theory would require an upheaval in constitutional doctrine respecting *inter alia* jury selection and legislative districting.

The Court's fears in this regard are unnecessary and largely a function of the Court's failure to understand the state of existing constitutional doctrine governing jury selection and legislative districting. First, the Court's sixth amendment doctrine *already* establishes a disproportionate impact test with respect to jury selection. See *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). Second, there is no occasion for application of a disproportionate impact test with respect to racial discrimination in legislative districting because the Court has indicated that where a particular multi-member districting scheme operates to disadvantage blacks but not other political minorities—that is, where a particular multi-member scheme has been serving as the vehicle of the electorate's racial prejudices—the multi-member scheme can be disestablished on the motivational (not impact) ground that the scheme is infected with discriminatory intent. See *White v. Regester*, 412 U.S. 755, 765-66, 767 (1973). Although Eisenberg reads *White* to authorize an impact

Finally, Professor Simon has written a thoughtful analysis,<sup>33</sup> but I am inclined to disagree with him to this extent: A law having a DRI, or a law granting preferential treatment to a racial minority, ought to be subject to an unusually heavy burden of justification *even if it is incontestable that the law was not motivated by any racial prejudice whatsoever*.<sup>34</sup> I have discussed the first sort of law—laws having a DRI—above. The second sort of law encourages thinking in racial terms, and thinking in racial terms is the soil on which racial prejudice grows;<sup>35</sup> moreover, where scarce resources (for example, seats in a medical school class) are at stake, preferential treatment is a source of racial resentment, itself a substantial cause of racial prejudice, and can generate feelings on the part of both the favored minority and the majority that the minority is somehow inferior. Government ought not to be permitted to resort to either sort of law unless it can establish that the interest(s) the law is intended to serve, factored by the extent to which the law serves the interest (and, of course, with reference to the possibility of alternate ways of serving the interest), is weighty enough to justify the costs of the law—in short, that the game is worth the candle.

The difference between this position and Simon's may be at least somewhat semantic: Simon seems to suggest that a law having a DRI and which cannot be explained as substantially related to, or necessary to the effectuation of, the governmental interest should be deemed enacted *or at least maintained* because of racial prejudice.<sup>36</sup> However, there is a sense in which more than semantics is at stake: In the present context, the function of imposing a heavier than usual burden of justification ought not to be understood as *solely* to flush out whatever racial prejudice

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test and not to require proof of illicit intent, the Court's reference in *Washington v. Davis* to its legislative districting cases amply supports the proposition that in districting cases the Court requires a showing of illicit intent and that impact per se (as opposed to impact as evidence of intent) is not significant. See *Washington v. Davis*, 426 U.S. 229, 240 (1976). *White*, read against the background of *Washington*, indicates that a showing that the challenged multi-member district serves as the vehicle of the electorate's racial animus can establish the requisite intent.

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

34. *But see id.* at 1110.

35. See Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 379-80 (1966).

36. *E.g.*, Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1126-27 (1978). The difference becomes even more a matter of semantics if one deems legislative inattention to the immediate or ultimate costs a law visits on the minority persons affected by it a form of racial prejudice. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1032 (1978).

might have motivated a law;<sup>37</sup> there is another and perhaps more basic function that imposition of a heavier burden would serve—a function that should be served—namely, to assure that laws with certain costs (specifically laws having a DRI and laws granting preferential treatment) are justified by sufficiently weighty considerations. After all, the second basic condition of constitutionality requires that the interest(s) a law was intended to serve, appropriately factored, be weightier than the interest(s) the law disserves, factored by the extent to which the law disserves that interest.<sup>38</sup>

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37. E.g., Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1070-71, 1076 (1978).

38. Note that under DRI theory, see Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977), a party challenging a facially neutral law having a disproportionate racial impact need not allege racially discriminatory motive and, moreover, probably would gain no tactical advantage in doing so. The showing required of government under DRI theory, if made, would in effect establish that which government would have to establish under *Arlington Heights* or the *Omaha* presumption, see note 22 *supra*: that a racially discriminatory motive was not a but for cause of the law. To this extent, adoption of DRI theory would render moot the second and third approaches to the problem of ascertaining racially discriminatory motivation, discussed in note 22 *supra*. Finally, note that adoption of (a) the *Omaha* presumption along with (b) the requirement that government, in order to prove that racially discriminatory motive was not a but for cause, establish that the licit interest(s) the legislature allegedly intended the law to serve are weighty and that the law is substantially related to the interest, would, for all practical purposes, be tantamount to adoption of DRI theory.

