"[W]e have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory ... simply because a greater proportion of Negroes fails to qualify than members of other racial or ethnic groups."

WASHINGTON v. DAVIS

426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

In 1971 Griggs v. Duke Power Co. interpreted Title VII of the Civil Rights Act of 1964, aimed at banning racial discrimination in employment in businesses involved in "commerce among the several states." The Duke Power Co., which had previously limited its most desirable jobs to whites, set up educational achievements and high scores on intelligence tests as prerequisites for those jobs. Few blacks qualified and a group of them claimed the "prerequisites" were discriminatory. The Court agreed, holding that the "prerequisites" were not related to the actual jobs.

At about the same time, several blacks filed suit in the District of Columbia, attacking the constitutionality under the Fifth Amendment as well as the legality under civil rights statutes of the hiring practices for police in the District. To be accepted for the police training program, an applicant had to receive a grade of at least 40 out of 80 on "Test 21," an examination used throughout the federal civil service to gauge verbal ability, reading, and comprehension. Plaintiffs claimed that Test 21 excluded a far larger proportion of blacks than whites and bore no relationship to job performance and asked for a summary judgment on the constitutional issue. The district court found the test was a valid instrument, but the court of appeals reversed. The District of Columbia sought and obtained certiorari.

Mr. Justice **WHITE** delivered the opinion of the Court....

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v. Sharpe (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact....

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.... The essential element of de jure segregation is "a current condition of segregation resulting from intentional state action." Keyes v. School Dist. No. 1 (1973). "The differentiating factor between de jure segregation and so-called de facto segregation ... is *purpose* or *intent* to segregate." ...

This is not to say that the necessary discriminatory racial purpose must be express or

appear on the face of the statute, or that a law's disproportionate impact is irrelevant.... A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. Yick Wo v. Hopkins (1886). It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law ... as to show intentional discrimination." Akins v. Texas [1945]....

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact ... may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

There are some indications to the contrary in our cases. In Palmer v. Thompson (1971), ... [t]he opinion warned against grounding decision on legislative purpose or motivation, thereby lending support for the proposition that the operative effect of the law rather than its purpose is the paramount factor. But the holding of the case was that the legitimate purposes of the ordinance– to preserve peace and avoid deficitswere not open to impeachment by evidence that the councilmen were actually motivated by racial considerations. Whatever dicta the opinion may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences.

Wright v. Council of City of Emporia (1972) also indicates that in proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor....

That neither *Palmer* nor *Wright* was understood to have changed the prevailing rule is apparent from *Keye*s, where the principal issue in litigation was whether and to what extent there had been purposeful discrimination resulting in a partially or wholly segregated school system. Nor did other later cases indicate that either *Palmer* or *Wright* had worked a fundamental change in equal protection law....

As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person ... equal protection of the laws" simply because a greater proportion of Negroes fails to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained. Test 21, which is administered generally to prospective Government employees, concededly seeks to ascertain whether those who take it have acquired a particular

level of verbal skill; and it is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes.... [T]he test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue.... [W]e think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability."C 5883.0000>

Under Title VII [of the Civil Rights Act of 1964], Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question. However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white....

[*Reversed*]

Mr. Justice **STEWART** [concurs].

Mr. Justice **STEVENS** concurring....

The requirement of purposeful discrimination is a common thread running through the cases summarized [by the Court.].... Although it may be proper to use the same language to describe the constitutional claim in each of these contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.

My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in Gomillion v. Lightfoot [1960] or *Yick Wo*, it really does not matter whether the standard is phrased in terms of purpose or effect. Therefore, although I accept the statement of the general rule in the Court's opinion, I am not yet prepared to indicate how that standard should be applied in the many cases which have formulated the governing standard in different language.

My agreement with ... the Court's opinion rests on a ground narrower than the Court describes. I do not rely at all on the evidence of good-faith efforts to recruit black police officers. In my judgment, neither those efforts nor the subjective good faith of the District administration, would save Test 21 if it were otherwise invalid.

There are two reasons why I am convinced that the challenge to Test 21 is insufficient. First, the test serves the neutral and legitimate purpose of requiring all applicants to meet a uniform minimum standard of literacy. Reading ability is manifestly relevant to the police function, there is no evidence that the required passing grade was set at an arbitrarily high level, and there is sufficient disparity among high schools and high school graduates to justify the use of a separate uniform test. Second, the same test is used throughout the federal service. The applicants for employment in the District of Columbia Police Department represent such a small fraction of the total number of persons who have taken the test that their experience is of minimal probative value in assessing the neutrality of the test itself. That evidence, without more, is not sufficient to overcome the presumption that a test which is this widely used by the Federal Government is in fact neutral in its effect as well as its "purpose" as that term is used in constitutional adjudication....

Mr. Justice **BRENNAN**, with whom Mr. Justice **MARSHALL** joins, dissenting [on statutory grounds]....

Editors' Notes

(1) Village of Arlington Heights v. Metropolitan Housing Development Corp. (1977) held that a real estate developer who had been denied a zoning permit to build integrated low and moderate cost housing in a suburb of Chicago had failed to show the denial was caused by a racially discriminatory purpose. " 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination,' " Justice Powell said for the majority, quoting from Washington v. Davis. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." But, he added, "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." Powell then offered a summary sketch of some of the factors at which a court should look to determine whether "racially discriminatory intent existed":

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action– whether it "bears more heavily on one race than another," Washington v. Davis [1976]– may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. Yick Wo v. Hopkins (1886); Guinn v. United States (1915); Lane v. Wilson (1939); Gomillion v. Lightfoot (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.
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> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. See Lane v. Wilson [1939]; Griffin v. School Board [1964]; Schnell v. Davis (1949); cf. Keyes v. School Dist. No. 1, Denver, Colo. [1973]. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. Reitman v. Mulkey (1967); Grosjean v. American Press Co. (1936). For example, if the property involved here always had been zoned R5 but suddenly was changed to R3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. See Tenney v. Brandhove (1951); United States v. Nixon (1974); 8 J. Wigmore, Evidence § 2371 (McNaughton rev. ed. 1961).

(2) White in *Davis* and Powell in *Arlington Heights* seem to equate "purpose" and "intent" and at times even "motive" with the other two. Would it improve doctrinal analysis to distinguish among these three concepts?

(3) For an analysis of *Davis*, see Barbara Lerner, "Washington v. Davis: Quantity, Quality, and Equality in Employment Testing," 1976 *Sup.Ct.Rev*. 263.

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