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The Supreme Court Is Afraid of Racial Justice

By OSAGIE K. OBASOGIE JUNE 7, 2016

San Francisco — ASK people to identify a few landmark Supreme Court decisions on race, and they are likely to point to classics like *Brown v. Board of Education*, which ended segregation in schools, or *Loving v. Virginia*, which prohibited restrictions on interracial marriages. But 40 years ago Tuesday, the Supreme Court decided a pivotal case on race and equality whose legacy has profoundly shaped American race relations. And most people have never heard of it.

The case, *Washington v. Davis*, involved the constitutionality of Test 21, developed by the federal government and used by the District of Columbia police force to assess people looking to become police officers. From 1968 to 1971, 57 percent of black applicants failed Test 21 compared with 13 percent of whites, leading two black would-be officers to file suit. The issue was whether a “race neutral” test that led to vastly different racial outcomes violated the Equal Protection Clause.

Consider three questions from Test 21:

1. Laws restricting hunting to certain regions and to a specific time of the year were passed chiefly to

A) prevent people from endangering their lives by hunting

B) keep our forests more beautiful

C) raise funds from the sale of hunting licenses

D) prevent complete destruction of certain kinds of animals

E) preserve certain game for eating purposes

2. The saying “Straight trees are the first to be felled” means most nearly

A) Honest effort is always rewarded.

B) The best are the first chosen.

C) Ill luck passes no one by.

D) The highest in rank have farthest to fall.

E) The stubborn are soon broken.

3. “Although the types of buildings in ghetto areas vary from the one-story shack to the large tenement building, they are alike in that they are all drab, unsanitary, in disrepair and often structurally unsound.” The quotation best supports the statement that all buildings in ghetto areas are

A) overcrowded

B) undesirable as living quarters

C) well constructed

D) about to be torn down

E) seldom inspected

Minority applicants were at a disadvantage because the questions were geared for white cultural norms and idioms. But the disparate failure rates also speak to decades of racially separate and unequal education. Test 21 can be seen as part of a long American tradition — from grandfather clauses to literacy tests — of seemingly race-neutral measures functioning in a discriminatory manner.

The United States Court of Appeals for the District of Columbia Circuit found that Test 21's grossly disproportionate impact on minority applicants violated the Equal Protection Clause. But when the case reached the Supreme Court, the justices disagreed.

Going against the grain of the era's racial progress, the justices in 1976 found that evidence of unequal outcomes was not enough to merit the court's highest form of review; a "discriminatory purpose" also had to be shown, virtually assuring Test 21's constitutionality.

To be sure, the court was not wholly insensitive to the possibility that statistical disparities might indicate injustice. As Ian Haney López, a law professor at Berkeley, has shown, discriminatory purpose at that time included a notion of examining context (though in this case the court did not consider the context to be convincing enough).

It marked the beginning of the Supreme Court's turn away from acknowledging structural racism, where the weight and inertia of America's openly discriminatory past have embedded themselves into practices like Test 21 that have no easily discernible bad purpose. Davis opened the door to what is now known as the "intent doctrine," which emerged in later cases as a simplistic search for a smoking gun — individual bad actors intentionally doing bad things with nothing but racial animus on their minds.

An example of this standard can be seen in *McCleskey v. Kemp*, a 1987 Supreme Court decision regarding racial disparities in death penalty sentencing in Georgia. Warren McCleskey offered a statistical study showing that defendants who, like him, were charged with killing whites were 4.3 times more likely to be sentenced to death than defendants who killed blacks; overall, blacks who killed whites were the most likely to receive the death penalty.

This evidence, along with Georgia's history of racial discrimination, was put squarely before the court. But it denied McCleskey's claims, saying that for him to prevail, he would have had to prove "that the decision makers in his case acted with discriminatory purpose" and that "the Georgia Legislature enacted or maintained the

death penalty statute because of an anticipated racially discriminatory effect.” He was executed in 1991.

This approach has dominated the court’s thinking and kept it from taking structural discrimination seriously. The Equal Protection Clause — part of the Reconstruction Amendments giving full citizenship to newly freed slaves — has been greatly diminished as a result. Reducing it to a judicial examination of individual mind-sets as opposed to being attentive to the structural nature of racism is a mockery of history, justice and common sense.

In his dissenting opinion in *McCleskey v. Kemp*, Justice William J. Brennan Jr. characterized the majority’s reluctance to consider the evidence of discrimination as “a fear of too much justice.” These words should haunt us, as they suggest that the unreasonably high bar that the court has established is a function of the very same ideologies of indifference that allow institutional racism to fester.

The 40th anniversary of *Washington v. Davis* should serve as a reflective moment for the court to rethink its commitment to racial equality and its approach to equal protection. Justice is not something that we can afford to be afraid of.

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