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Unreachable Heights

Desuetude, Selective Enforcement, and an Arlington Heights Record of Purposeful Discrimination, 1886 to 2026

> **The right has never been withdrawn. Over fifty years, seven separate decisions made proving it depend on documents only the accused holds.**

Travis Gilly, *Unreachable Heights: Desuetude, Selective Enforcement, and an Arlington Heights Record of Purposeful Discrimination, 1886 to 2026*, August 2026 (v1).

Travis Gilly
Real Safety AI Foundation

SETTLED SINCE 1886

A fair law, unfairly applied, is itself a violation

American law has held for more than a century that a statute perfectly even on its face can still be administered with an evil eye and an unequal hand, and that administering it that way is unconstitutional in itself.

Nobody has ever taken that back. It remains good law today.

SOURCES Yick Wo v. Hopkins, 118 U.S. 356 (1886).

AND THE PROBLEM WAS VISIBLE IMMEDIATELY

In 1967 a court connected the doctrine to the proof, and dismissed anyway

One federal trial court tied being singled out for enforcement back to that nineteenth-century doctrine, and to the scholarship on rules left unused, and then dismissed anyway, since the defendant had brought nothing at all to show the state had picked him in particular.

So the recognition and the difficulty of proving it were both on the record before anything that came afterwards was built.

SOURCES This Article, Part II.B.

WHAT THIS PAPER DOES

It builds a record, using the courts' own method

To establish a discriminatory reason, the test looks for background history that exposes a run of official acts, for how events unfolded in order, and for what people on the deciding body were saying while it happened.

This paper assembles exactly that, about the courts, from their own published reasons, and then runs their own test against it.

> **This is not offered as an indictment. It is offered as a record, and the record fails, for a reason the doctrine itself supplies.**

SOURCES Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266–68 (1977).

PART ONE

Seven Decisions

each on separate ground, and each dated and attributed

I

No two of them cite each other's reasoning. That is what makes the result structural.

1976

Intent becomes an element

A measure does not become unconstitutional merely because its effects land more heavily on one race. Establishing a breach means establishing that somebody meant to discriminate. Impact is not irrelevant; it is simply not the thing that decides it.

The following year the Court supplied the evidence a plaintiff could use: how heavily it lands, what came before it, the order things happened in, procedure that was not followed, substance that was not followed, and the paper trail, including remarks from those doing the deciding.

> **Two features of that list govern everything after it. Every factor assumes a discrete decision with a decisionmaker and a date. And every single factor is an internal record.**

SOURCES Washington v. Davis, 426 U.S. 229, 242 (1976); Arlington Heights, 429 U.S. at 266–68, 270–71.

1979

And knowing what will happen is expressly not enough

Purposeful discrimination means more than intent as an act of will, and more than intent as awareness of what will follow. What it demands is that whoever decided picked that route partly on account of the damage it would do to a recognisable group, and not simply while accepting that damage.

> **Foresee the harm, carry on regardless, and be caught afterwards having foreseen it, and by this definition you still have not discriminated.**

SOURCES Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

1987

The aggregate is disqualified as evidence

Researchers ran a regression holding some two hundred and thirty variables unrelated to race constant, and found a marked gap in one state's death sentencing according to the victim's race. Taking the study as sound for the sake of argument, the Court said it fell well short of supporting any inference that anyone deciding that particular case had acted for a discriminatory reason. A defendant must prove that the decisionmakers in his own case did.

The reason given is on the page. There is no limiting principle to a challenge of this kind. The Court is not saying the evidence is weak. It is saying that letting evidence like this in carries consequences it declines to accept.

> **This is where the architecture becomes visible, because the aggregate was the only available way of proving something that is aggregate by nature.**

SOURCES McCleskey v. Kemp, 481 U.S. 279, 292, 297, 318 (1987).

1996

Discovery becomes conditional on what only discovery can produce

Before any documents change hands in a case about being singled out for prosecution, the defendant has to demonstrate credibly that comparable people were handled differently. To establish that effect, the claimant must show that similarly situated people of another race were not prosecuted. It added that the disclosure rules cover government papers bearing on answering the prosecution case, but not on getting a claim like this ready, and it worked throughout from an assumption that officials had behaved properly.

> **Whoever decides on charges is the party holding the information about everyone they did not charge. Obtaining it is what disclosure is for. And disclosure will not open until you already hold it.**

SOURCES United States v. Armstrong, 517 U.S. 456, 463–65, 470 (1996); United States v. Chemical Foundation, Inc., 272 U.S. 1, 14–15 (1926).

2001

The route that never needed intent is closed

Deliberate discrimination is all that one part of the federal funding statute prohibits. And nobody holds an independent private right to enforce the effects regulations issued under the part beside it.

The reasoning is about implied rights of action rather than about discrimination at all. The effect is that a plaintiff unable to prove purpose has, against a federally funded recipient, no private route left.

> **Within a handful of years, writers in environmental justice had reached a verdict: what a claimant now had to show was for practical purposes impossible, and between them the two rulings had emptied both the constitutional provision and the statute of any working reach.**

SOURCES Alexander v. Sandoval, 532 U.S. 275, 280, 293 (2001); Acherman, D. (2008). 4 *FIU L. Rev.* 133.

2009

And the same lock appears on the civil door

Plausibility pleading was generalised and applied to purpose. Bring a claim of invidious discrimination and you must both plead and establish that the defendant acted for a discriminatory reason, using the definition settled in 1979, which the Court set out in full. Turning up with assertions and nothing else will not get the disclosure process opened for you. And, declining an invitation to allow limited discovery instead, the Court held that a deficient complaint earns no discovery, cabined or otherwise.

> **Two doors, the same lock. One governs the criminal track and one the civil, and each requires the claimant to hold the evidence before the mechanism for getting it will open.**

SOURCES Ashcroft v. Iqbal, 556 U.S. 662, 676, 678–79, 686 (2009); Feeney, 442 U.S. at 279.

WHY THE PAIRING MATTERS

Two unrelated chains of reasoning, one identical result

An objection is coming: keep the criminal case out of a civil argument, since deciding whom to charge enjoys a constitutional shelter that ordinary administration lacks, and the assumption that officials acted properly belongs to the charging role in particular. The objection is well taken, and it is exactly why the pairing is worth making.

The 1996 case arrives at its result through one rule of procedure, the charging power, and that presumption. The 2009 case arrives at the same result through a different rule, plausibility, and immunity for senior officials. Neither cites the other's ground.

> **Find the identical bolt fitted at the far end of two unconnected trains of thought, and the bolt is unlikely to have come from either train. Something showing up only in criminal cases would be a quirk of criminal cases. This turns up on both sides.**

SOURCES Armstrong, 517 U.S. at 464; Iqbal, 556 U.S. at 686.

AND IT IS NOT A NICHE RULE

How far the 2009 decision reaches

156,387

opinions citing it as of August 2026, roughly ten times the next most cited decision in this record

4,520

citing the 1977 decision that supplies the test a plaintiff would use to prove purpose

The pleading standard that closes the door is cited about thirty-five times more often than the test that describes how to get through it.

SOURCES CourtListener citation counts, retrieved August 2026.

2011

The aggregate is disqualified a second time, as a vehicle

Showing that a scheme built on individual judgement calls generated an imbalance does not supply the shared question a group action needs. Commentary at the time placed the decision in the same trend as the pleading cases, describing the effect as a heightened commonality requirement restricting access to adjudication on the merits.

> **One decision disqualified the aggregate as evidence. Another disqualified it as a procedural vehicle. So there are two ways to make out a case about a pattern, demonstrating the pattern or bringing the action as the affected group, and neither remains open.**

SOURCES Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); Spencer, A. B. (2012). *Class Actions, Heightened Commonality, and Declining Access to Justice*.

PART TWO

Run Their Own Test On It

the record is complete, and it still fails

II

It fails for the reason the 1979 decision supplies, which is what makes the point.

WHAT THE RECORD HAS

A completeness that is rare

The test wants historical background revealing a series of official actions, the specific sequence, and contemporaneous statements by the people deciding. All three are available here in unusual fullness, for a peculiar reason: of all bodies that make decisions, appeal courts are the ones that print their own workings.

Seven decisions, each dated, each attributed, each quoted for the reason its author gave.

SOURCES Arlington Heights, 429 U.S. at 266–68.

AND IT STILL FAILS

Because awareness of consequences sits outside the definition

In each instance the court can be shown to have grasped the effect of what it was doing. More than one says so outright, setting an institutional concern against a claimant's and noting which won.

None of that reaches the standard, because the standard asks whether the decisionmaker chose the course because of its adverse effects rather than merely in spite of them, and foreseeing the effect is expressly not enough.

> So the architecture immunises itself. Put together the most thoroughly evidenced history anybody could put together, run the test precisely as written, and it still comes back negative.

SOURCES Feeney, 442 U.S. at 279; McCleskey, 481 U.S. at 318; Armstrong, 517 U.S. at 470.

PART THREE

Two Claims That Follow

one about what the standard measures, one about who can pay for it

III

The remedy is rationed along the same axis as the injury.

FIRST CLAIM

A standard provable only from internal records measures documentation

Recall where all six evidentiary factors live. History, sequence, procedural departures, remarks made at the time: all of them belong to whoever made the decision, which is to say all of them sit with the party being accused.

A test that can only be satisfied out of somebody's own files is not really measuring their purpose. It is measuring how much they wrote down.

> **Which means the standard rewards whoever documents least, and the incentive it creates runs in the wrong direction.**

SOURCES Arlington Heights, 429 U.S. at 266–68.

SECOND CLAIM

Reaching internal records takes counsel, time, and staying power

Reaching somebody else's paperwork means hiring counsel, waiting out the years disclosure runs to, and being able to survive that wait without your case falling apart in the meantime.

Those are the same resources whose absence characterises most of the people the underlying rights exist to protect.

> **So the remedy is rationed along the same axis as the injury. Five separate literatures document that pattern independently.**

SOURCES This Article, Part V.

PART FOUR

The Route Not Taken

a doctrine that would have prevented the revival

IV

Desuetude was available, was argued, and was declined.

WHAT DESUETUDE WOULD HAVE DONE

A dormant rule stops being available for selective revival

The idea is simple. Leave a rule unused for long enough and it stops being usable, which means it cannot lie sleeping in the statute book until somebody wants it for one person or one community.

That would have addressed selective enforcement at its source, without anybody having to prove what was in an official's mind, because the rule would simply no longer be there to select with.

SOURCES This Article, Parts I.C and II.

AND IT WAS DECLINED

The argument was made, and answered, in 1967

The same 1967 decision that connected selective enforcement to the old doctrine also engaged the desuetude literature, and declined to take that route.

So both halves of the problem were identified in the same opinion, nearly sixty years ago: the right exists, proving it is nearly impossible, and there was an alternative that would have avoided the proof problem altogether.

SOURCES This Article, Part II.B.

THE CLAIM, RESTATED

The right was never withdrawn. It was made unreachable.

Seven decisions, each resting on separate ground, each reasoned without reference to the others. Together they make intent an element, put awareness of consequences outside it, disqualify the aggregate as evidence, condition discovery on evidence only discovery can produce, close the route needing no intent at all, and bar aggregation as a vehicle.

Nothing in that sequence overruled anything from 1886. The holding stands untouched. What changed is that satisfying it now requires documents held by the party you are accusing, obtained through a process you cannot enter without them.

> **Assemble the best record anybody could build, from the decisionmakers' own published reasons, and run their own test on it. It fails. That is not an accusation. It is a demonstration.**

SOURCES Yick Wo v. Hopkins, 118 U.S. 356 (1886); Washington v. Davis, 426 U.S. 229 (1976); Feeney, 442 U.S. 256 (1979); McCleskey, 481 U.S. 279 (1987); Armstrong, 517 U.S. 456 (1996); Sandoval, 532 U.S. 275 (2001); Iqbal, 556 U.S. 662 (2009); Dukes, 564 U.S. 338 (2011).

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