# COMPETING CONCEPTIONS OF "RACIAL DISCRIMINATION": A RESPONSE TO COOPER AND GRAGLIA

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In his introduction to this panel on competing conceptions of racial discrimination, Lawrence Siskind remarks that the 1960s marked "a period of relatively easy moral identification."[1] Looking back at what he calls "the Romantic Age of Civil Rights," Siskind claims that "it was easy to distinguish the heroes from the villains. On the one hand, there were Martin Luther King, Jr., Rosa Parks, and Medgar Evers. On the other hand, there were Bull Connor, filibustering southern senators, and Klansmen."[2]

On which side would the Federalist Society and its allies have stood during the "Romantic Age of Civil Rights"? The great legal victories of the "heroes" stemmed from commitments, ideas, intuitions, and tendencies that the Federalist Society has been railing against throughout its institutional life: rulings that subjected increasingly large areas of social life to federal constitutional norms,[3] judgments that privileged protest over order,[4] legislation that empowered the federal government at the expense of state governmental prerogatives,[5] and a judicial methodology that rejected originalism,[6] overturned precedent,[7] and strained interpretations of statutes.[8]

Ronald Reagan and Robert Bork opposed the "heroes" on crucial issues during the Romantic Age of Civil Rights; both, for instance, objected to key aspects of the Civil Rights Act of

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1. Siskind, *Introduction: The Age of Ambiguity*, 14 HARV. J.L. & PUB. POL'Y 65, 66 (1991).

2. *Id.*

3. *See, e.g.*, Peterson v. City of Greenville, 373 U.S. 244 (1963); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

4. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965); Garner v. Louisiana, 368 U.S. 157 (1961).

5. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

6. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

7. *See, e.g.*, Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

8. *See, e.g.*, Boynton v. Virginia, 364 U.S. 454 (1960).

1964.[9] Their ideological kin, Charles Cooper and Lino Graglia, among others, are making a similar mistake again.[10] Cooper and Graglia seem to agree with the Reagan Justice Department that "the necessary element of an act of discrimination is a *mens rea* or discriminatory intent: the deliberate use or consideration (overtly or covertly) of a racial or other proscribed criterion in the decision-making of the alleged discriminator."[11] Their model for illegal racial discrimination is the employer[12] who, because of race, treats a prospective or incumbent employee less well than another employee: the employer who hires A rather than B solely because A is white and B is black.[13]

The first thing to be noted about this model of purposeful discrimination is that it does represent a leap forward in the moral life of our nation. When slavery was still alive, most areas of the United States permitted or required individuals to discriminate intentionally against blacks on the basis of race. After the abolition of slavery and until the 1960s, intentional racial

9. When he was Governor of California, Reagan opposed the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Open Housing Act of 1968. *See* R. DUGGER, ON REAGAN: THE MAN AND HIS PRESIDENCY 195-219 (1983). When he was President of the United States, Reagan continued to oppose civil rights measures of almost every variety. *See, e.g.*, Days, *Turning Back The Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984). In 1963, in a now infamous article, Robert Bork opposed enactment of the then-pending public accommodations section of the Civil Rights Act. *See* Bork, *Civil Rights—A Challenge*, THE NEW REPUBLIC, Aug. 31, 1963, at 21. At the hearings preceding the Senate's refusal to confirm Bork as an associate justice of the United States Supreme Court, various witnesses cited that article as one indication, among several others, that he would fail to protect the rights of racial minorities against hostile action. *See Nomination of Robert H. Bork To Be An Associate Justice of the United States Supreme Court: Hearings before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 36, 37 (1987). For Bork's reflections on this aspect of his career, see R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 79-81 (1990).

10. *See* Cooper, Wards Cove Packing Co. v. Atonio*: A Step Toward Eliminating Quotas in the American Workplace*, 14 HARV. J.L. & PUB. POL'Y 84 (1991); Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination in Employment*, 14 HARV. J.L. & PUB. POL'Y 68 (1991).

11. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, REDEFINING DISCRIMINATION: "DISPARATE IMPACT" AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 1 (Nov. 4, 1987).

12. Although the debate over defining discrimination touches on every aspect of social interaction, I shall focus my comments mainly upon the employment context.

13. Some observers see race-conscious affirmative action that prefers blacks to whites as yet another variant of intentional discrimination that ought to be outlawed. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring in judgment). I believe, however, that there is a compelling difference between racial discrimination that imposes or maintains pigmentocracy, and racial "discrimination" that subverts pigmentocracy. The latter is morally, politically, and constitutionally justifiable. *See* Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986).

discrimination continued to be *the* salient feature of race relations in the United States despite the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. Only within the past twenty-five years has there emerged a national consensus that stigmatizes intentional invidious racial discrimination as illegal and immoral.

That salutary process of stigmatization, however, is far from complete; intentional racial discrimination is still a pervasive feature of American life.[14] One reason for this is the half-hearted way in which all too many people attack intentional racial discrimination. For instance, in the aftermath of *Patterson v. McLean Credit Union*[15]—in which the Supreme Court held that the Civil Rights Act of 1866 applies only to intentional discrimination in the formation of contracts and not to intentional discrimination in the performance of them—the Bush administration initially indicated that it did not see the necessity for legislation that would rectify the Court's egregious ruling.[16] Only to short-circuit legislation that it opposed did the administration finally evince any desire to undo the harm wrought by *Patterson*.[17] The same pattern of behavior is observable with respect to many who label themselves "conservatives," "strict constructionists," et cetera. They loudly proclaim their abhorrence of intentional racial discrimination when it is expedient to do so—for instance, when verbally attacking intentional discrimination is a mere prelude to bashing affirmative action or some other policy aimed at advancing aggressively the cause of racial equality. All too often, however, they suddenly become mute or even apologetic when they encounter naked racism or blatant prejudice in a context in which speaking up loudly on behalf of racial justice might incur a political cost—when they have encountered, for instance, Jesse

14. Nothing better indicates the pervasiveness of old-fashioned anti-Negro bigotry than the effect of racial considerations on electoral politics. *See, e.g.*, Edsall, Book Review, THE NEW REPUBLIC, July 30, 1990, at 35 (reviewing K. PHILLIPS, THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH (1990)); Applebome, *The 1990 Elections: North Carolina; Helms Kindled Anger in Campaign, And May Have Set Tone for Others*, N.Y. Times, Nov. 8, 1990, at B3, col. 1.

15. 109 S. Ct. 2363 (1989).

16. *See Ruling Said to Spur Dismissal of Bias Claims*, Wash. Post, Nov. 20, 1989, at A6, col. 1.

17. *See Hill Coalition Aims to Counteract Court on Job Bias; Administration, in Reversal, Plans Alternative Legislation Addressing Civil Rights Issues*, Wash. Post, Feb. 8, 1990, at A10, col. 1; *Critics of Rights Law Fear a Flood of Suits Over Jobs*, N.Y. Times, May 28, 1990, § 1, at 8, col. 5.

Helms's appeals to racial bigotry.[18]

The second thing that needs to be noted about the model of discrimination championed by Cooper and Graglia is that it does not adequately capture the range of conduct pertaining to race relations that is and should be illegal. Consider an employer who decrees that he will only employ candidates who obtain a certain score on a standardized test that has no direct relevance to the employment at stake, or one who refuses to consider a candidate who has ever been arrested for a felony, or one who declines to consider candidates who live over a mile from the place of employment. Assume that none of these criteria reliably indicates whether a given applicant can efficiently perform the job at issue. But also assume that in each of these cases the employer applies his criteria evenhandedly to all individual candidates regardless of race and that he chose his criteria, not with the intent of excluding blacks, but rather on the basis of custom, intuition, or convenience. Finally, assume that as a result of imposing these criteria, a substantially larger percentage of blacks is excluded in comparison with whites.

The logic of Cooper and Graglia insists that the hypothesized employers be insulated from legal liability. After all, these employers are not engaged in intentional discrimination. Cooper and Graglia argue, in effect, that for the legal system to demand any more than lack of intent to discriminate would amount to, in Siskind's phrase, the imposition of "liability . . . divorced from immorality."[19]

Fortunately, Title VII of the Civil Rights Act of 1964[20] does require more, and because it does it has invalidated exclusionary practices of the sort mentioned above.[21] The disparate-impact prong of Title VII[22] requires that employers give justification for practices that impose a disparate impact upon a given group, even if the practice was instituted or maintained

18. *See, e.g., Bennett Assails Affirmative Action Plans as "Wrong"*, Wall St. J., Nov. 20, 1990, at A22, col. 1 (William Bennett endorsing Helms's campaign tactics).

19. Siskind, *supra* note 1, at 66.

20. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

21. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (invalidating test and educational credential requirements); Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975) (invalidating railroad's policy of refusing to consider for employment any person convicted of a crime other than a minor traffic offense).

22. Title VII has another prong, the "disparate-treatment" prong, that effectuates a prohibition against intentional discrimination. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

with no intent to discriminate against that group or any members of it. A practice imposes a disparate impact when it adversely affects a given group (for example, blacks) to a significantly greater degree than a relevant control group (for example, whites). The paradigmatic example would be a test which excludes from employment a significantly higher percentage of blacks than whites.

The seminal case is *Griggs v. Duke Power Co.*,[23] in which the Supreme Court ruled that a plaintiff may make out a prima facie case under Title VII by showing simply that an employment practice results in a disparate impact. That alone, according to the Court, shifts the burden to the defendant to justify its challenged practice. Without a justification, the defendant is said to "discriminate," even if the plaintiff has made no allegation of intentional discrimination. To negate the charge of discrimination once a disparate impact has been shown, the Court held that the employer must show that the challenged practice is justifiable in terms of "business necessity," by which the Court meant that the defendant would have to show that its practice is demonstrably "related to job performance."[24]

The defendant's burden of rebuttal has been the locus of intense controversy for obvious reasons: the heavier that burden, the more far-reaching the consequences of the disparate-impact conception of discrimination. An appropriate burden would impel many businesses to avoid litigation by changing their personnel policies. It would also lead to judicial invalidation of a broad array of standardized tests. Until relatively recently, an appropriately burdensome rebuttal standard governed Title VII jurisprudence. As Cooper approvingly notes,[25] however, the Supreme Court, in *Wards Cove Packing Co. v. Atonio*,[26] has now considerably lightened the defendant's rebuttal burden. The civil rights community believes, rightly, that the Court has erred, and seeks through legislation to restore the disparate-impact methodology to its former vigor. But even under *Wards Cove*, Title VII still requires a result that Cooper and Graglia resist as a matter of fundamental principle: the im-

23. 401 U.S. 424 (1971).
24. *Griggs*, 401 U.S. at 431.
25. *See* Cooper, *supra* note 10, at 91.
26. 109 S. Ct. 2115 (1989).

position of legal liability in the absence of intentional discrimination.

Why should we be in favor of imposing legal liability in the absence of intentional discrimination? The essential reason is that intentional racial discrimination is not the only form of conduct affecting race relations that is morally deficient and worthy of legal rebuke. There are other forms of conduct worthy of moral and legal condemnation: for instance, thoughtless practices that unintentionally burden historically disadvantaged groups when alternative, less burdensome practices could be pursued without undue cost; and complacent practices that show indifference towards the imposition of avoidable burdens on groups that suffer from injuries received from oppression in the past. Action—or inaction—of this sort is not as evil as intentional discrimination. But it is certainly morally tainted. Moreover, it is precisely such conduct that now constitutes the most important hindrance that our society faces in its struggle to transcend the gravitational pull of its racist history.

If Cooper and Graglia had their way, the employers hypothesized above might not even have to give an explanation for the practices they use, even if these practices have a racially disparate impact. They could thus freely allow racial discrimination in the realm of education (reflected perhaps in lower scholastic achievement by blacks), or racial discrimination in the administration of justice (reflected perhaps by higher rates of arrests and convictions for blacks), or racial discrimination in housing (reflected in lower rates of residence by blacks in desirable areas) to be translated into a new burden in yet another sphere of social life: the employment market. By contrast, the disparate-impact conception of discrimination can resist, to a significant degree, the process by which injuries inflicted by racial subordination in the past become the very basis on which black candidates for employment or promotion are excluded from opportunities in the present.

The disparate-impact approach is not a panacea for all of the injuries wrought by past oppression. If an employer can show that her business requires new hires to possess certain knowledge, then her demand that employees demonstrate such knowledge will be exempt from liability even under the most rigorous conception of disparate impact, even though her demand excludes far more blacks than whites, and even though

the absence of the knowledge required stems from racial oppression in the past. But disparate-impact analysis at least prompts employers and judges to ask whether the task of obtaining efficient workers can be fulfilled without unduly perpetuating racial inequalities. That is its virtue. Disparate-impact analysis disrupts "business as usual." It compels the employer to think anew about her business, its real needs, and her social responsibilities. It serves, in short, as a salutary antidote to complacency.

Cooper attacks the disparate-impact conception of discrimination because it makes race "a constant concern to most employers."[27] Under the disparate-impact analysis, it is not enough, he complains, for employers to be race-blind. To the contrary, to protect themselves from liability, or the risk of liability, employers will likely feel compelled to be race-conscious in at least two ways. First, employers will habitually pay attention to the racial consequences of the criteria they use for choosing, promoting, or discharging employees. Second, if the criteria used produce a racially disparate impact, many employers will either (1) substitute new criteria for the existing ones in the hope that the new criteria will have no, or at least less, racially disparate impact, or (2) use racial preferences—which Cooper refers to as "quotas"—to offset the disparate impact of the existing criteria. Thus, it is argued, instead of allowing race consciousness to wither away, the disparate-impact conception of discrimination entrenches race consciousness.[28]

This charge, which is of course part of a broader attack against *all* race-conscious affirmative action,[29] does contain a grain of legitimate concern. Applied simplistically, disparate-impact analysis—like *any* methodology—can lead to objectionable results. Making the defendant's burden of rebuttal too heavy could compel employers to institute inefficient and unwise personnel practices, including rigid racial quotas. Cooper, however, offers no basis (other than his own assertions) for believing that *Griggs* and its progeny actually subjected employers to such consequences on anything like the scale that he con-

27. Cooper, *supra* note 10, at 90.

28. For a careful elaboration and analysis of this and related points, see Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1984).

29. *See* Bartholet, *The Radical Nature of the Reagan Administration's Assault on Affirmative Action*, 3 HARV. BLACKLETTER J. 37 (1986).

cocts as a bogeyman.[30] By making suits more winnable for potential plaintiffs, disparate-impact analysis does force many[31] employers to examine seriously the racial consequences of their policies. But on balance this is a *good* development, not a bad one. Properly conceived and administered, disparate-impact analysis encourages awareness of the complex reality of racial subordination and its interaction with business practices that have an adverse racial impact, while still allowing businesses to fulfill their legitimate goals. This type of race consciousness, though not without potential difficulties, is surely more appealing than the race blindness that Cooper seems to favor—a myopia that would allow an employer to impose any criteria no matter how arbitrary, no matter how avoidable, and no matter how injurious to historically oppressed groups, just so long as the employer acted without intent to discriminate.

Thus far, I have defended the disparate-impact conception of discrimination on the ground that it is attentive to aspects of the race problem that will be left unaddressed if our legal system confines itself merely to rectifying instances of intentional racial discrimination. This alone is sufficient to warrant continued application of the disparate-impact analysis. But there is another strand of the disparate-impact conception of racial discrimination that deserves at least a mention: the meritocracy strand.

All too often in debates about racial policy, equality concerns are pitted against meritocratic claims as if the two are inevitably antagonistic.[32] But the struggle for racial equality has largely been a struggle to make authentic meritocracy possible. The prevailing norm of social life in the United States has been characterized not by meritocracy but by "pigmentocracy" and other forms of caste oppression that have privileged white men at the expense of individuals associated with other groups. The

30. *See* Cooper, *supra* note 10, at 89-90.

31. Title VII only applies to businesses with 15 or more employees. *See* 42 U.S.C. § 2000e(b) (1988). Nearly 15 percent of the national workforce is thus outside the protections of Title VII. *See* Eisenberg & Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 602 (1988).

32. *See, e.g.*, I. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 192-225 (1990) (discussing "Affirmative Action and the Myth of Merit"); J. LIVINGSTON, FAIR GAME? INEQUALITY AND AFFIRMATIVE ACTION 153-67 (1979) (discussing "Meritocracy and Racism"). For an excellent exploration of the concept of merit in the context of race relations law, see Fallon, *To Each According to His Ability, From Each According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. REV. 815 (1980).

Second Reconstruction and the various social movements that it helped to inspire have significantly altered this history. *Griggs* is part of this dramatic alteration. It strikes a blow not only for racial justice but for meritocracy as well. It recognizes that both can be smothered by complacent credentialism.[33] It prompts employers to be more careful in their process of evaluating individuals and cautions them against reliance on means of assessment that unjustifiably impose a disparate impact.

In the *Griggs* opinion, Chief Justice Burger articulated the meritocratic strand that has been minimized, unfortunately, by its friends and foes alike. The facts of the case demonstrated, he observed,

> the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees.[34]

The wisdom of that statement has enriched *all* persons living in the United States and not simply blacks and members of other historically oppressed groups. It is wisdom to which we should carefully attend as we continue to seek ways to advance our racially diverse nation towards a more just and productive future.

33. *See Griggs*, 401 U.S. at 433 ("Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.").

34. *Id.*